United States Court of Appeals for the Second Circuit

APPENDIX

76-7252

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B p/s

CITY OF DETROIT, et al.,

v.

GRINNELL CORPORATION, et al.,

BAY FAIR SHOPPING CENTER, EXXON CORPORATION, FRIENDSWOOD DEVELOPMENT COMPANY, INTERNATIONAL LUBRICANT CORPORATION and SHELL OIL COMPANY, Claimants,

Appellants.

UNITED STATES COURT OF APPEALS
FILED
AUG 2 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX - VOLUME I

WILLIAM SIMON
G. JOSEPH KING
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for Appellants

PAGINATION AS IN ORIGINAL COPY

8-27

HOWREY & SIMON
1730 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20006
(202) 872-6800

August 25, 1976

Mr. John A. Brascia
Deputy Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: City of Detroit, etc. v. Grinnell Corp., et al.
68 C 4026-7-8; C/A Nos. 76-7252, 76-7253, 76-7254

Dear Mr. Brascia:

In conversations with Ms. Rosalie Bruloo of your office today, she commented that there is still some concern about the legibility of page 318 of Volume I of the Appendix in the above-referenced case. That page represents a one-page pleading filed in the District Court on May 11, 1972, by a party not involved in the current appeal and we had it reproduced as legibly as possible and inserted again by our printer last week.

Nonetheless, I have had that page retyped, and ten copies are enclosed herewith. I would appreciate your having it stapled in each of the ten Volumes for me.

Thank you very much, and I apologize for the inconvenience.

Sincerely,

G. Joseph King

G. Joseph King

GJK/fle

Enclosures

HOWREY & SIMON
1730 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006
(202) 872-3500

August 19, 1976

Mr. John A. Brascia
Deputy Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: City of Detroit, etc. v. Grinnell Corp., et al.
68 C 4026-7-8; C/A Nos. 76-7252, 76-7253, 76-7254

Dear Mr. Brascia:

I am returning to you today under separate cover the nine copies each of Volumes I and II of the Appendix in the above-entitled case which you sent to me with your letter of August 5, 1976. The pages which you designated as illegible have all been replaced with the best copies that we were able to make and I trust you will find them acceptable.

As discussed with you by telephone, pages 575-607 in Volume I, and pages 1165-1174 in Volume II, each constitute the original slip opinions in this case and are immediately followed in the Appendices by printed versions of these same opinions (see pages 608-617 and 1176-1179.) Although this fact is designated in footnotes to the Table of Contents in each Volume, I am including a page noting this fact immediately preceding each of the original slip opinions.

In addition, I wish to point out that pages 333-336 in Volume I contain only a table of contents and table of authorities. These pages do not contain material which is important to the appeal, although clearer replacement copies were included.

Finally, pages 1129-1132 and 1147-1150 of Volume II consist merely of exhibits which are not materially important to the appeal. Since we do not have access to any better copies, we are unable to furnish completely legible copies for the Appendix. However, these pages also are not essential to the appeal and I trust will be satisfactory to you.

Thank you very much for your cooperation in this matter.

Sincerely,

G. Joseph King

G. Joseph King

GJK/fle

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* Because the official Opinion (A574-A607) did not lend itself to high quality reproduction in this Appendix, for the Court's convenience a copy of the Opinion as reported in 5 CCH Trade Reg. Rptr. ¶ 74,341, has also been included

CITY OF DETROIT, AND CITY OF PHILADELPHIA
VS
GRINNELL CORP., et al

DATE	PROCEEDINGS	Date Ord. Judgment
.14-68	Filed papers originally filed in Eastern District of Pennsylvania were this day filed: Complaint, summons, jury demand, return on summons; motion for order to preserve status quo; Defts. Memo. in support of motion; Defts. motion in support of motion; order staying all proceedings as indicated; stip. and order extending time to answer; transcript; ANSWER of Holmes Elec; ANSWER of Automatic Fire Alarm; ANSWER of Grinnell Corp.; ANSWER of American Dist. Telegraph Co.; Notice listing case for trial; jury demand by Holmes Elec. Pro. Co.; Order staying proceedings; certified copy of order transferring to S.D.N.Y, and certified copy of the docket entries.	
	RECORD OF PROCEEDINGS - S.D.N.Y.	
9-69	Filed Motion to Determine the Class Action.	
10-69	Filed Notice of Motion Ret. Room 2201 before Metzner, J. re: Determine that these actions may not be maintained as class actions (Also in 68 Civl 4027 and 68 Civil 4028) (date to be set)	
10-69	Filed Notice of Motion re: partial summary judgment. Ret. Room 2201 before Metzner, J. date to be set by the Court (Filed in 67 Civ. 2249) (CGSR&O)	
10-6	Filed Defendants Interrogatories. "	
10-69	Filed Notice of Motion re: partial summary judgment. Ret. 2201 befor Metzner, J. date to be set by the Court (Filed in 67 Civ. 2594) (KDERMAL)	
7-69	Filed Notice of Motion Ret. before Metzner, J. date to be set by the court re: amend co	
7-69	Filed Affidavit of Service of Notice of Motion.	
-69	Filed Affidavit of Herbert B. Newberg	
-69	Filed Pltfs' Memorandum of Law in support of motion to amend complaint.	
20-69	Filed Opposing Affidavit to motion by pltfs. to amend their complaints and add AFA as a defendant to the extent that the motion of Automatic Fire Alarm Co. of Delaware (AFADEL) to dismiss the complaints, etc. (Filed in M 19-92)	
20-69	Filed Opposing Memorandum on behalf of Automatic Fire Alarm Co. (Also in 68 Civ. 4027 68 Civ. 4028 and 68 Civ. 4029). (Filed in M 19-92)	
19-69	Filed OPINION #36156. Metzner, J. Automatic Fire Alarm motionis granted. So ordered. (mailed notice) Filed in 68 Civil 2789.	
.22-69	Filed MEMO. END. on motion papers filed 7/7/69. This motion granted. See opinion filed this day in Damon Alarm Corp., etal vs. American District Telegraph, et al 68 Civil 2789. So ordered. Metzner, J.	
.27-69	Filed stipulation and order substituting Olwine, Connelly, Chase, O'Donnell & Weyher as attorneys for Automatic Fire Alarm Co. in place and stead of Stickles, Haydon, Kennedy, Hort & Van Steenburg.	
.20-70	Filed pltff's objections to deft's interrogs.	
71	Filed Pltffs' joint brief in support of National Class Actions	
26-71	Filed affdvt of William F. Halpin (for deft (American District Telegraph Co.) in opposition to class action allegations of complaints	
26-71	Filed defts' memorandum in opposition to maintenace of these suits as national class actions	
.1-71	Filed pltff's joint reply memorandum in support of maintenance of these suits as national class actions.	
.1-71	Filed affidavit of H.L. Montague, Jr. in support of national class actions.	
18-71	Before Metzner, J. Hearing held--Dec. Reserved	
71	Filed Transcript of record of proceedings, dated 6-18-71	
26-71	Filed defts' affdvts' in opposition to maintenance of these suits as national class acti	
14-71	Filed memo endorsed on motion filed 6-9-69---this motion is disposed of in accordance with settlement order #1 in this action signed today-Metzner, J.	

(cont'd on pg. 2)

Rev. Civil Docket Continuation

PROCEEDINGS

Date Order or Judgment Noted

-71 Filed SETTLEMENT ORDER NO. 1---Ordered that all discovery & other pre trial proceedings
in the actions except only proceedings as specifically provided in settl [illegible]
agreement are stayed for purpose of settlement only.--Motion of pltffs' to have
these actions maintained as class actions are hereby granted & that class in
civil actions be defined as indicated. A Committee shall be formed to supervise &
carry out the provisions of this order including notice to members of these
classes. Defts' shall bearall expenses incurred by the Committee in connection
with such notices. All other expenses will be paid out of the settlement fund.
The last day for prospective members of the class to file requests for exclusion
shall be 1-26-72 & last day for members to file a "Sworn Statement of Claim"
shall be 2-10-72. A hearing shall be held 4-27-72 in rm 1105 for purpose of
determining whether the settlement agreement etc. shallbe approved & these actions
discontinued with prejudice & whether application for the attys. fees etc. shall
be approved. Class members wishing to file their objections must do so before
4-13-72 in writing with Clerk of this Court-Metzner, J. m/n

13-71 Filed David Berger et al preliminary memorandum in support of award of attys. fees
from class actions' settlement fund

14-71 Filed memo endorsed on motion filed 6-10-69---This motion is disposed ofin accordance
with settlement order No. 1 signed today in these three actions-So ordered-Metzner, J.

15-71 Filed affdvt of William Halpin (Vice Pres-Finance of deft American Dist.Telegraph)
re removing names & addresses from the list

16-71 Filed affdvt of Frank Fritz (for deft Holmes Protection Inc) purs. to settlement order No
16-71 Filed affdvt of Lawrence W. Thomason (Pres. of AFA Protective Systems Inc) purs.
to paragraph 6(a) of settlement order No. 1

28-71 Filed affdvt of Lawrence W. Thomason (for AFA Protective Systems Inc.) in accordance
with paragraph 8 of Settle order No. 1 with Exhibit 1 (mailed notices of class actions)
attached

29-71 Filed defts' brief in support of paragraph 4 of settlement order No. 1

11-72 Filed D.Reiner,Inc. Authorization to retain Gerstenhaber & Diamond, Esqs. to
appear as its attys. & to attend all meetings in connection with above matter

10-72 Filed affdvt of Mailing to list of Customers in accordance with paragraph 8 of
settlement Order No. 1 signed by Metzner, J.

14-72 Filed stipulation among counsel for class representative pltffs' & counsel for
defts' that the attys. as indicated shall constitute a class action committee as
provided for in paragraph 3 of settlement order No. 1-Metzner, J.

17-72 Filed Acknowledgment of Receipt by mail of notice of exclusion

21-72 Filed Claimant's Purchases of Accredited Central Station Protection together
with properly executed sworn statement of claim

24-72 Filed Hutzler Bros. Election to be excluded from Class of pltffs' purs. to provisions
of para. 1 & 3 of notice of 12-13-71

24-72 Filed J.C. Penney Co. Inc. Election to be excluded from Class of pltffs' purs. to
provisions of para. 1 & 3 of notice of 12-13-71

28-72 Filed Letter of Cahill,Gordon,Sonnett,Reindel & Ohl dated 1-19-72 to Metzner,J
enclosing affdvts' of publication executed by NY Times & Wall St. Journal

7 Filed Transcript of record of proceedings [illegible] -71

10-72 Filed Harvey S. Aronfeld, Mesirov,Gelman,Jaffe,& Levin entry of appearance for
additional Commercial &Industrial members of classes of pltfffs' as indicated

10-72 Filed Mesirov,Gelman,Jaffe & Levin motion of the Twenty Commercial & Industrial
Members of classes of pltffs' named in the entry of appearances filed by Mesirov etc
& dated 1-19-72 & 1-31-72 to compel discovery on theproposed settlement issues

10-72 Filed Mesirov,Gelman,Jaffe &Levin memorandum in support of its motion to compel
discovery on the proposed settlement issues

10-72 Filed notice of appearance for pltff Agway Inc. by attys. Regan,Goldfarb,Powell & Quinn

10-72 Filed notice of appearance for claimant Alexander's Inc. by Trubin,Sillcocks,Edelman & Kn

14-72 Filed memorandum of class representatives pltffs' in opposition to motion of 20
Commercial & Industrial class members to compel discovery on proposed settl. issues

(cont'd on pg 3)

BEST COPY

DATE	PROCEEDINGS	Date Order Judgment N.
22-72	Filed Motion of Commercial & Industrial Members of classes of pltffs' named in entry of appearance of Mesirov, Gelman, Jaffe & Levin of 1-19-72 & filed in these actions to modify the Court's settlement order No. 1	
28-72	Filed Movants' Reply to pltffs' memorandum in opposition to motion of Twenty Commercial & Industrial class members represented by Mesirov, Gelman, Jaffe & Levin to compel discovery on the proposed settlement issues	
1-72	Filed Supplemental memorandum of class members representatives contra motion of twenty commercial & industrial class members to compel discovery on the proposed discovery issues	
2-72	Before Metzner, J. Hearing on motion heard	
3-72	Filed 41 folders containing challange claims numbered as follows: Claims Nos. 1 thru 2786; Claims Nos. 2800 thru 2831; Claims Nos. 4000 to 4217	
3-72	Filed letter from David Berger, of class action committee re: above challenge letters & claims	
13-72	Filed affdvt of Robert Donnelly (V.P. of American Dist. Telegraph) with respect to mailing of class notices re new labels on returned envelopes	
15-72	Filed Petitioner, Cocoline Chocolate Co. Application asking Court to issue an order to accept Cocoline's original claim for consideration by this Court as if it were timely filed prior to 2-10-72	
21-72	Filed entry of appearance of Stuart H. Rome on behalf of Greater Baltimore Medical Center	
24-72	Filed affdvts of Harry Garfinkel of Appeal Printing Co. to comply at request of Holmes Electric Protective Co. with requirements of Paragraph 8 of Settlement Order No. 1 requiring an affdvt of service & submitting a list of names which conform to labels which were mailed out; & affdvt of Bud Homan, counsel for deft Holmes-electric Co. with respect to amiling of class notice herein etc.	
4-72	Filed Letter of White & Case to Metzner, J. on behalf of all defts' in support of proposed Settlement Order No. 2	
4-72	Filed affdvt. of H. Laddie Montague (for Class Representatives) in support of the request for an extension of time to file certain papers previously required to be filed on 3-21-72	
4-72	Filed SETTLEMENT ORDER NO. 2--Ordered that Paragraphs 11(b) & 12 of Settlement Order No. 1 are amended to extent that the time within which the Class Action Committee is to file an affdvt setting forth the name, address, etc. of the claim of each member of any of the classes is adj. from 3-21-72 to 4-21-72; Paragraph 13 of settlement order No. 1 is amended to provide that the hearing on the approval of the settlement agreement, plan of allocation & application for attys. fees & disbursements scheduled for 4-27-72 in rm 1105 is adjourned until 5-24-72 in at 4:30 PM etc. etc. Metzner, J.	
r.21-72	Filed Affidavit of H. Laddie Montague, Jr. re: Statements of Claim.	
r.21-72	Filed Appendix "C" List of Entries of appearance.	
.21-72	Filed Appendix "D" List of Written Exclusions from these class actions, mailed on or before 1/26/72.	
r.21-72	Filed Petition of Counsel for The Class Representatives for Award of Counsel Fees and Costs.	
r.21-72	Filed Memorandum of Counsel for The Class Representatives in support of their petition for Counsel Fees and Costs.	
r.21-72	Filed Plan of Allocation of Settlement Fund	
r 21-72	Filed Appendix "A" List of Claimants by claim number, amt. of claim & challenges	
r 21-72	Filed Appendix "B" Alphabetical List of Claimants	
r 25-72	Filed stip. & order that motion to reduce legal fees & to delay the proposed settlement is adj. from 4-27-72 to 5-24-72 at 4:30 PM in rm. 35 So ordered Metzner, J	
r 26-72	Filed Pritchard, McCall & Jones application for allowance of attys. fees for representing pltffs' Pizitz Inc.	

AVAILABLE

City of Detroit et al vs Grinell Corp. et al 68 CIV 4026

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
May 11-72	Filed affdvts' of Alvin Stein, A. Paul Victor & Herbert Robinson re:award of counsel fees in within actions in a sum not in excess of 20% of gross settlement
May 11-72	Filed Liebman, Eulau, Robinson & Perlman memorandum of law in support of application to limit & apportion counsel fees
May 12-72	Filed Humble Oil & Refining Co., International Lubricant Corp., Shell Oil Corp., Bay Fair Shopping Center et al notice of motion& Motion for an order setting an evidentiary hearing on 5-24-72 before Metzner, J. on the issues raised by the fee petition of counsel for the temporary class representatives
May 12-72	Filed memorandum of claimants General Motors Corp. et al & Ford Moter Co. et al in opposition to petition for counsel fees
May 12-72	Filed affdvt in opposition to petition of counsel for class representatives for award of counsel fees & costs
May 12-72	Filed Notice of Claimants General Motors Corp., General Motors Acceptance Corp., Ford Motor Co., Ford Leasing Development Co., Philco-Ford Corp. & Philco-Ford Distributors Inc. - of intention to answer
May 12-72	Filed defts' Grinell Corp. et al opposing memorandum to motion of alleged commercial & industrial class members to postpone the settlement & fee hearing scheduled for 5-24-72
May 12-72	Filed Towley, Updike, Carter & Rodgers notice of appearance & intention to be heard for The Mead Corp., a member of the class in the actions
May 12-72	Filed Mead Corp. supplemental memorandum in support of acceptance of the amended claim No. 1551
May 12--72	Filed Emigrant Savings Bank statement of objections to award of costs & attys. fees
May 15-72	Filed Application of Wald, Harkrader & Ross for appointment of Counsel fees
May 15-72	Filed Supplemental affdvt of A. Paul Victor to correct & incorrect case No. of his affdvt executed on 5-8-72
May 15-72	Filed Objections of the 20 Objectors represented by Mesirov, Gelman, Jaffe & Levin to the proposed settlement & their brief in support thereof
May 15-72	Filed Objections of Bay Fair Shopping Center, Friendswood Development Co., Garden Plaza Corp, Humble Oil & Refining Co., International Lubricant Corp. & Shell Oil Co. to all applications for counsel fees & costs
May 15-72	Filed Howrey, Simon, Baker & Murchison notice of intention to appear as counsel for Bay Fair Shopping Center, Friendswood Development Co. et al
May 15-72	Filed Claimant 20th Centur y-Fox Film Corp. consent to proposed plan of Allocation of Settlement Fund & objection to petition for award of counsel fees
May 15-72	Filed Botein, Hays, Sklar & Herzberg notice of intention to be heard at hearing on 5-24-72 on behalf of claimants Hart, Shaffner & Marx & other claimants listed on attached schedule
May 15-72	Filed affdvt of Nathaniel Whitehorn (member of firm of Botein, Hays, Sklar & Herzber in opposition to proposed settlement of this class action & in opposition to application by counsel for the class for an allowance of counsel fees in amt. of 25% of the settlement fund.
May 18-72	Filed Class Representative pltffs' answer to motion of the Commercial & Industrial class members represented by Mesirov, Gelman, Jaffe & Levin to postpone the settlement hearing
May 22-72	Filed deft American Dist. Telegraph Co. affdvt & notice of motion to quash subpoena
May 22-72	Filed reply affdvt of Herbert Robinson reply affdvt to Application of Wald, Harkrader & Ross for apportionment of counsel fees
May 23-72	Filed Memorandum of American Cyanamid Co. & Shulton Inc. in opposition to petition counsel for the class representatives for award of counsel fees & costs
May 23-72	Filed Notice of Intention to Appear of Donovan, Leisure, Newton & Irvine to determine the fairness of the Settlement agreement & the propriety of counsel fees requested by counsel for the class representatives

(cont'd on pg. 5)

page 5

DATE	PROCEEDINGS	Date Order Judgment No.
23-72	Filed - in 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028 - Memorandum of R.J. Reynolds Industries in opposition to Request for Attorneys Fees.	
23-72	Filed - in 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028 - on 2/22/72 Filed Motion of Commercial and Industrial Members of Classes re: modify Court's Settlement Order No. One. - MEMO.END. (on 3/23/72) The motion to extend time to file the written election to be excluded from the class actions is denied. The motion was argued on 3/2/72 and at that time the Court indicated this result. etc.etc. Problems regarding the settlement may be presented and determined in the proceedings concerned with that issue. So ordered. Metzner, J. (mailed notice).	
24-72	Filed Affidavit of Service of Notice of Appearance of Lord,Day & Lord, Memorandum in Support of Approval of Settlement,etc.	
	Filed Notice of Appearance by Lord, Day & Lord, for counsel David Berger, Esq. and David Berger, P.A., counsel for class representatives in each of the cases 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028	
24-72	Filed in 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028	
	Memorandum on behalf of all defts. in support of the proposed settlement(for 6	
	Defendants' Affidavits in support of proposed settlement.	
	Objections to Proposed Settlement and Petition for Award of Costs and Attorneys' Fees by Fran Stef Corporation.	
	Memorandum in support of approval of proposed settlement.	
	Petitioner's Reply Memorandum in support of his request for attorneys' fees and contra objections thereto.	
	Affidavit in oppositionto application by Parker, Chapin & Flattau,etal for attorneys fees.	
	Memorandum of American Cyanamid Co. and Shulton Inc. in opposition to petition of counsel for Class representatives for Award of Counsel Fees and Costs.	
	Memorandum on behalf of all defendants in support of the proposed settlement in 68 Civ. 4027).	
	Filed Affidavit of Robert O. Donnelly in support of proposed settlement.	
	" Objections to Proposed Settlement and Petition for Award of Costs and attorneys' fees by Fran Stef Corp.	
	" Memorandum in support of approval of proposed settlement (David Berger).	
	" Petitioner's Reply Memorandum in support of his request for attorneys' fees and contra objections thereto.	
	" Affidavit of David Berger, Esq. in opposition to application by Parker, Chapin & Flattau,etal for attorneys fees.	
24-72	Filed Affidavit of Service of Defts' Memorandum in support of Proposed Settlement and accompanying affidavits of Robert O. Donnelly upon many parties on 5/23/ in 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028.	
25-72	Filed affdvt of Henry Silbernerg (firm of Stroock & Stroock & Lavan) for claimants Sucrest Corp. et al in opposition to petition of counsel for class action representatives for the award of counsel fees	
26-72	Filed affdvt of A.Paul Victor submitted to correct the statement made in 5(c) of the original affdvt.	
30-72	Filed Bay Fair Shopping Center's et al response to "petitioner's reply memorandum in support of his request for attys. fees & contra objections thereto"	
31-72	Filed affdvt of service by mail on 5-31 of an affdvt objecting to petition for counsel fees on Cahill,Gordon et al	
-72	Filed Transcript of Record of Proceedings dated March 3,1972.	
-72	Filed affdvt of Harry Garfinkel (Appeal Printing Co.)to comply with the requirements of paragraph 5 of settlement order No.1 requiring an affdvt of service & affdvt of Joseph Burke (Automatic Fire Alarm Co.) with respect to mailing of	

(Cont'd on pg 6)

DATE	PROCEEDINGS	Ju
June 7-72	Filed affdvt of David Shapiro (atty. for pltffs in 68-2789)	
June 5-72	Before Metzner, J. Hearing for attys. fees held & concluded-Dec. Res.	
JULY 24 72	Filed Transcript of the record of proceedings dtd May 24 25 1972.	
Aug 21 72	Filed Notice of Change of address of Law firm of Howrey, Simon, Baker & Murchison to 1730 Pennsylvania Ave., N.W. Wash. DC 20006.	
SEPT 8 72	Filed Transcript of the record of proceedings dtd June 5 1972.	
Dec27-72	Filed OPINION #39061.- The settlement of the claims embraced in the 3 nat'l class actions are approved. I subscribe to the principle that counsel who contributed to the benefit conferred on the class are entitled to compensation for that effort. Counsel will be advised of the date for a hearing on the application for an appointment of the fee allowed for services rendered in obtaining a settlement of the national class actions. So ordered Metzner, J.	
Jan.23-73	Filed Memorandum on behalf of all defendants in support of proposed settlement.	
Jan.23-73	Filed Defts', Affidavits in support of proposed settlement.	
Jan.23-73	Filed Affidavit of H.Laddie Montague, Jr. re: Statements of Claim #2.	
Jan.23-73	Filed Affidavit of mailing of Notice.	
Jan.23-73	Filed Objections to Proposed Settlement and Petition for Award of Costs and Attorneys Fees by Fran Stef Corporation. (MML & SLC) (DB & HLM, J.	
Jan.23-73	Filed Memorandum in support of approval of Proposed Settlement.	
Jan.23-73	Filed Affidavit of H.Laddie Montague, Jr. re: statements of Claim #1.	
Jan.23-73	Filed Appendix "C" List of Entries of Appearance.	
Jan.23-73	Filed Appendix "D" List of Written Exclusions from these class actions, mailed on or before 1/26/72.	
Jan.23-73	Filed Memorandum of R.J.Reynolds Industries in Opposition to Request for Attorneys Fees. (DP&W) (CW&T)	
Jan.23-73	Filed Notice of Motion to reduce legal fees and delay settlement.	
Jan.23-73	Filed Memorandum of Law of Members of Pltf. Commercial Class in support of motion to reduce legal fees and to delay settlement (amended). (CW&T)	
Jan.23-73	Filed Petitioner's Reply Memorandum in support of his request for Attorney's fees and contra objections thereto. (DB & HLM, Jr.	
Jan.23-73	Filed Memorandum of Claimants General Motors Corp., etal and Ford Motor Co.etal in opposition to petition for counsel fees. (MML & SLC)	
Jan.23-73	Filed Notice of Intention to be heard.	
Jan.23-73	Filed Memorandum of counsel for the Class representatives in support of their petition for counsel fees and costs. (DB & HLM, Jr.	
Jan.23-73	Filed Petition of counsel for the Class representatives for award of counsel fees & Costs. (DB)	
Jan.23-73	Filed FINAL JUDGMENT. The claims (as defined in paragraph 2 herein) of each and every member of the Class (as defined in paragraph 1 herein) are dismissed with prejudice and without costs, and each member of the Class is forever barred and permanently enjoined from instituting or maintaining any action on, or asserting in any way the said Claims as against any and all of the said defendants; Said defts. are discharged from any and all liability to any and all members of the Class in respect to any and all claims described in paragraphs 2 and 3 hereof, except as to their obligations under the Settlement Agreement approved by this Court; This Court retains jurisdiction of this matter for the purpose of ascertaining that all parties perform and discharge their obligations under the Settlement and Agreement and enforcement thereof, etc. Metzner, J. Judgment ent. 1/23/73. Ent. 1/24/73. (mailed notice). (Also in 68 Civ. 4027 and 68 Civ. 4028).	

continued next page

68 Civil 4026 CITY OF DETROIT, etc. vs. GRINNELL CORP., et al

DATE	PROCEEDINGS	Date Order or Judgment No.
n.26-73	Filed FINAL JUDGMENT. Ordered that Counsel for the Class Representatives, David Berger and David Berger, P.A., Attorneys at Law are allowed $14,911.73 as out-of-pocket litigation expenses to 4/20/72 to be paid from initial installment of the Settlement Fund; Ordered Counsel for the Class Representatives is awarded attorney's fees in the amt. of $1,500,000. to be paid from the Settlement Fund; This Court retains jurisdiction for the purpose of: (a) determining the petitions of Weil, Gotshal & Manges; Liebman, Eulau, Robinson & Perlman; and Parker, Chapin & Flattau, and (2) of Wald, Harkrader & Ross for an apportionment of the attorney's fee awarded to the Class Representatives; and (b) determining the manner and time of payment of said fees; (c) determining further allowance and out-of-pocket expenses to Counsel for the Class Representatives. Metzner, J. (Also in 68 Civ. 4027 & 68 Civ. 4028).	(LE
n.29-73	Filed Notice of Appeal by Bay Fair Shopping Center; Exxon Corp. successor by merger to the Humble Oil & Refining Co.; Friendwood Development Co., Garden State Plaza Corp., International Lubricant Corp. and Shell Oil Co., claimants herein (Also in 68 Civ. 4027 and 68 Civ. 4028). (mailed notice).	
b.1-73	Filed Amended Notice of Appeal by Bay Fair Shopping Center; Exxon Corporation, successor by merger to the Humble Oil & Refining Co., Friendswood Development Co.; Garden State Plaza Corp., International Lubricant Corp. and Shell Oil Co. (mailed notice). (Also in 68 Civ. 4027 and 68 Civ. 4028)	
.5-73	Filed copy of Judgment entered 1/23/73 with notice of entry.	
.9-73	Filed - Descripton of Parts of Trascript pur. to Rule 10(b) Fed.R.App.P. to be included in Record and Statement of Issues. (Filed in M 19-92 also)	
b.8-73	Filed ORDER that J.C.Penney Co.Inc. and Hutzler Brothers be added to Schedule "A" annexed to Final Judgment as persons who are excluded from the Class described in paragraph 1 of the Final Judgment.Metzner, J. (mailed notice).	
b.16-73	Filed Affidavit in opposition (Docketed also in M 19-92). (& in 2 related cases). to Petition for Award of Counsel Fees.	
.16-73	Filed letter from Trubin Sillcocks Edelman & Knapp - objecting to the excessive counsel fees.	
b.16-73	Filed AMENDED NOTICE OF APPEAL (Amendment to Prior Notice of Appeal by Bay Fair Shopping Center, Exxon Corp., successor by merger to the Humble Oil & Refining Co., Friendswood Development Co., Garden State Plaza Corp., International Lubricant Corp. and Shell Oil Co.(mailed notice) in 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028).	
b.20-73	Filed Notice of Appeal by Supermarkets General Corp., Shop Rite of Clark, Inc. Shop-Rite of Madison Twp.Inc., and additional claimants (see entry in M 19-92). (mailed copies - labels for service list provided).	
b.15-73	Filed Notice of Appeal by Alden Industries, Inc., Clifton Yarn Mills, Inc.,etal (additional claimants see entry in M 19-92). (mailed copies)	
b.21-73	Filed Bond for Costs on Appeal by Alden Industries, Inc. and 19 other claimants ($250. Reliance Insurance Co.).	

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1225 Vine St. Bldg. Inc.;, et al vs. GRINNELL CORP., et al

68 CIVIL 402

CIVIL 4027

	PROCEEDINGS	Date Order Judgment No
-68	Papers originally filed in Eastern District of Pennsylvania, Phila., Pa., were this day filed: Complaint, summons, jury demand, return on summons; Defts. Memorandum in support of motion for order to preserve status quo; Defts. Memorandum in support of motion; Order that all proceedings to stayed as indicated: stip. and order extending time of defts. to answer: Transcript. ANSWER OF Holmes Electric Protective Co.; ANSWER of Automatic Fire Alarm Co. of Delaware; ANSWER of Grinnell Corp: ANSWER of American District Telegraph Co.; Notice of case listed for trial; Jury demand by Holmes Electric Protective Co.; copy of order staying proceedings; certified copy of order transferring to S.D.N.Y., and certified copy of docket entries.	
	RECORD OF PROCEEDINGS - S.D.N.Y.	
-69	Filed Motion to determine the Class Action.	
0-69	Filed Notice of Motion Ret. Room 2201 before Metzner, J. re: Determine that these actions may not be maintained as class actions (Filed in 68 Civil 4026)	
10-69	Filed Notice of Motion re: partial summary judgment. Ret. Room 2201 before Metzner, J. date to be set by the Court (Filed in 67 Civ. 2249) (COSMO)	
10-69	Filed Defendants Interrogatories. "	
10-69	Filed Notice of Motion re: partial summary judgment. Ret. 2201 before Metzner, J. date to be set by the Court (Filed in 67 Civ. 2594) (KD...W)	
9	~~Filed Notice of Motion Ret. before Metzner, J. date to be set by the court re: amend com~~	
9	~~Filed Affidavit of Service of Notice of Motion.~~	
9	~~Filed Affidavit of Herbert H. Heuberg.~~	
9	~~Filed Pltfs' Memorandum of Law in support of motion to amend complaint.~~	
-69	Filed Opposing Affidavit to the motion by pltfs. to amend their complaints and add AFA as a deft. to the extent that the motion of Automatic Fire Alarm Co. of Delaware (AFADEL) to dismiss the complaints. (Filed in 68 Civ. 4026)	
-69	Filed Opposing Memorandum on behalf of Automatic Fire Alarm Co. " " "	
9-69	Filed OPINION #36156. Metzne , J. Automatic Fire Alarm motion is granted. So ordered. (mailed notice) Filed in 68 Civil 2789.	
22-69	Filed MEMO.END. on motion papers filed 7/7/69. This motion granted. See opinion filed this day (9/19/69) in Damon Alarm Corp. et al vs. American District Telegraph, et al 68 Civil 2789. So ordered. Metzner, J.	
-69	Filed stipulation and order substituting Olwine, Connelly, Chase, O'Donnell & Weyher as attorneys for deft. Automatic Fire Alarm Co. of Delaware, in place and stead of Stickles, Hayden, Kennedy, Hort & Van Steenburgh. So ordered. Clerk.	
-70	Filed pltff's objections to deft's interrogs.	
71	Filed pltffs' joint brief in support of National Class Actions	
-71	Filed affdvt of William F. Halpin (for deft American District Telegraph Co.) in oppositin to class action allegations of complaints	
-71	Filed defts' memorandum in opposition to maintenance of these suits as national class actions	
-71	Filed pltff's joint reply memorandum in support of maintenance of these suits as national class actions.	
-71	Filed affidavit of H.L. Montague, Jr. in support of National class actions.	
-71	Before Metzner, J. Hearing held - Dec. Reserved	
71	~~Filed Transcript of record of proceedings dated~~ 6-15-71 (filed in 68 civ 4026)	
-71	Filed defts' affdvt in opposition to class maintenance of these suits as national class actions	
-71	Filed memo endorsed on motion filed 6-9-69 --- This motion is disposed of in accordance with Settlement Order No. 1 in this action signed today - So ordered - Metzner, J.	

1225 Vine St. Bldg. Inc. et al vs Grinell Corp. 68 CIV 4027

D. C. 110 Rev. Civil Docket Continuation page 2

DATE	PROCEEDINGS	Date Judgment
13-71	Filed SETTLEMENT ORDER No. 1---Ordered that all discovery & other pre trial proceedings in the actions except only proceedings as specifically provided in settlement agreement are stayed for purpose of settlement only. Motion of pltffs' to have these actions maintained as class actions are hereby granted & that class in civil actions maintained as class actions are be defined as indicated. A Committee shall be formed to supervise & carry out the provisions of this order including notice to members of these classes. Defts' shall bear all expenses incurred by the Committee in connection with such notices. All other expenses willbe paid out of the settlement fund. The last day for prospective members of the class to file requests for exclusion shall be 1-26-72 & last day for members to file a "Sworn Statement of Claim" shall be 2-10-72. A hearing shall be held 4-27-72 in rm. 1105 for purpose of determining whether the settlement agreement etc. shall be approved & these actions discontinued with prejudice & whether application for the attys. fees etc. shall be approved. Class members wishing to file their objections must do so before 4-13-72 in writing with Clerk of this Court-Metzner, J. m/n	
c 13-71	Filed David Berger et al preliminary memorandum in support of attys. fees from class actions' settlement fund	
c 14-71	Filed memo endorsedon motion filed 6-10-69---This motion is disposed of in accordance with settlement order No. 1 signed today in these three actions-So ordered-Metzner.	
c 15-71	Filed affdvt of W. Halpin (Vice-Pres.-Finance of deft American Dist. Telegraph) re removing various names & addresses from the list	
c 16-71	Filed affdvt of Frank Fritz (for deft Holmes Protection Inc) pursuant to settlement order No. 1	
c 16-71	Filed affdvt of Lawrence W. Thomason (Pres. of AFA Protective Systems Inc.) purs. to paragraph 6(a) of settlement order No. 1	
c 28-71	Filed affdvt of Lawrence W. Thomason (for AFA Protective Systems Inc.) in accordance with paragraph 6 of settle order No. 1 with Exhibit 1 attached	
c 29-71	Filed brief of defts' in support of paragraph 4 of settlement order No. 1	
n 10-72	Filed affdvt of Mailing to list of Customers in accordance with paragraph 8 of settlement Order No. 1 signed by Metzner, J	
n 11-72	Filed D. Reiner Inc. Authorization to retain Gerstenhaber & Diamond, Esqs. to appear as its attys. & to attend all meetings in connection with above matter	
n 12-72	Filed notice of appearance of Goodstein, Zamore, Mehlman & Krones for Actors Fund of America	
an 14-72	Filed stipulation among counsel for class representative pltffs' & counsel for defts' that the attys. as indicated shallconstitute a class action committee as provided for in paragraph 3 of settlement order No. 1-Metzner, J.	
Jan 17-72	Filed Acknowledgment of receipt by mail of notice of exclusion	
Jan 24-72	Filed Hutzler Bros. Election to be excluded from Class of pltffs' purs. to provisions of para. 1 & 3 of notice of 12-13-71	
Jan 24-72	Filed J.C. Penny Co. Inc. Election to be excluded from Class of pltffs' purs. to provisions of para. 1 & 3 of notice of 12-13-71	
Jan 25-71	Filed Election of R.H. Macy & Co. Inc. to be excluded from class actions	
Jan 26-72	Filed letter of Hughes, Hubbard & Reed to Clerk of Court dated 1-26-72 re notice of appearnnce	
Jan 26-72	Filed notice of appearance of Hughes, Hubbard & Reed for Ford Motor Co., Ford Leasing Development Co., & Philco-Ford Corp.	
Jan 26-72	Filed Letter Of Cahill, Gordon, Sonnett, Reindel & Ohl dated 1-19-72 to Metzner, J enclosing affdvts' of publication executed by NY Times & Wall St. Journal	
[illegible]-72	Filed Transcript of record of proceedings dated [illegible] 71	
Feb 3-72	Filed notice of appearance of Milton B. Seasonwein for members of the class of pltffs' in this action as indicated	
Feb 3-72	Filed notice of appearance of Leon, Weill & Mahony for Acme Backing Corp., one of parties in class of pltffs' in this action	
	(cont'd on pg 3)	

	PROCEEDINGS	Date Ord. or Judgment
10-72	Filed Mesirov, Gelman, Jaffe & Levin entry of appearance for additional Commercial & Industrial members of classes of pltffs' as indicated	
10-72	Filed Mesirov, Gelman, Jaffe, Levin memorandum in support of its motion to compel discovery on the proposed settlement issues	
10-72	Filed Mesirov, Gelman, Jaffe & Levin motion of the Twenty Commercial & Industrial Members of classes of pltffs' named in the entry of appearances filed by Mesirov	
10-72	Filed notice of appearance for pltff AGWAY Inc. by attys. Regan, Goldfarb, Powell & Quin	
10-72	Filed notice of appearance for claimant Alexander's In c. by Trubin, Sillcocks, Edelman &	
14-72	Filed memorandum of class representatives pltffs' in opposition to motion of 20 Commercial & Industrial class members to compel discovery on proposed settl. issues	
22-72	Filed Motion of Commercial & Industrial members of classes of pltffs' named in entry of appearance of Mesirov, Gelman, Jaffe & Levin dated 1-19-72 & filed in these actions to modify the Court's settlement order No. 1	
28-72	Filed Movants' reply to pltffs' memorandum in opposition to motion of Twenty Commercial Members represented by Mesirov, Gelman, Jaffe & Levin to compel discovery on proposed settlement	
1-72	Filed Supplemental memorandum of class representatives contra motion of twenty commercial & industrial class members to compel discovery on the proposed discovery issues	
3-72	Filed 41 Folders containing challenge claims numbered as follows: Claims Nos. 1 thru 2780; claims Nos. 2800 thru 2931; Claims Nos. 4000 to 4217	
3-72	Filed letter from David Berger, of class action committee re: above challenge letters & claims	
15-72	Filed notice of appearance of Mortimer Lerner for Fran Stef Corp. (a member of class of pltffs')	
21-72	Filed entry of appearance of Stuart H. Rome on behalf of Greater Balt. Medical Center	
4-72	Filed letter of White & Case to Metzner, J. on behalf of all defts' in support of proposed settlement order No. 2	
4-72	Filed affdvt of H. Laddie Montague (for class representatives) in support of the request for an extension of time to file certain papers previously required to be filed on 3-21-72	
4-72	Filed SETTLEMENT ORDER NO.2---Ordered that paragraphs 11(b) & 12 of Settlement Order No. 1 are amended to extent that the time within which the Class action Committee is to file an affdvt setting forth the name, address & amount of the claim of each member of any of the classes is adj. form 3-21-72 to 4-21-72; paragraph 13 of settlement order No. 1 is amended to provide that the hearing on the approval of the settlement agreement, plan of allocation & application for attys. fees & disbursement s scheduled for 4-27-72 in rm 1105 is adj. until 5-24-72 in rm 35 at 4:30 PM etc. Metzner, J	
21-72	Filed Affidavit of H. Laddie Montague, Jr. re: Statements of Claim.	
21-72	Filed Appendix "C" List of Entries of Appearance.	
21-72	Filed Appendix "D" List of Written Exclusions from these class actions, mailed on or before 1/26/72.	
21-72	Filed Petition for Counsel for The Class Representatives for Award of Counsel Fees and Costs.	
21-72	Filed Memorandum of Counsel for The Class Representatives in support of their petition for Counsel Fees and Costs.	
21-72	Filed Plan of Allocation of Settlement Fund.	
21-72	Filed Appendix "A" List of Claimants by claim number, amt. of claim & Challenges	
25-72	Filed stip & order that motion to reduce legal fees & to delay the proposed settlement in these cases, is adj. from 4-27-72 to 5-24-72 at 4:30PM in rm. 35 So ordered Metzner, J	
26-72	Filed Pritchard, McCall & Jones application for allowance of attys. fees for services in representing pltffs' Pizitz Inc. et al in Civ. Action 67-471, Northern Dist. of Alabama	

(cont'd on pg. 4)

DATE	PROCEEDINGS	J
May-11-72	Filed affdvts' of Alvin Stein, A. Paul Victor & Herbert Robinson re: award of counsel fees in within actions in a sum not in excess of 20% gross settlement	
May 11-72	Filed Liebman, Bulan, Robinson & Perlman's memorandum of law in support of applicat to limit & apportion counsel fees	
May 12-72	Filed Humble Oil & Refining Co., International Lubricant Corp., Shell Oil Corp. Bay Fair Shopping Center et al notice of motion & Motion for an order setting an evidentiary hearing on 5-24-72 before Metzner, J. on the issues raised by the fee petition of Counsel for the temporary class representatives	
May 12-72	Filed memorandum of claimants General Motors Corp. et al & Ford Motor Co. et al in opposition to petition for counsel fees	
May 12-72	Filed affdvt in opposition to petition of counsel for class representatives for award of counsel fees & costs	
May 12-72	Filed Notice of Claimants General Motors Corp., General Motors Acceptance Corp. Ford Motor Co., Ford Leasing Development Co., Philco-Ford Corp. & Philco-Ford Distributors Inc. - of intention to answer	
May 12-72	Filed defts' Grinell Corp. et al opposing memorandum to motion of alleged commerc & industrial class members to postpone the settlement & fee hearing scheduled for 5-24-72	
May 12-72	Filed Townley, Updike, Carter & Rodgers notice of appearance & intention to be heard for the Mead Corp., a member of the class in the actions	
May 12-72	Filed Mead Corp. supplemental memorandum in support of acceptance of the amended #1551	
May 12-72	Filed Emigrant Savings Bank statement of objections to award of costs & attys. fe	
May 15-72	Filed Application of Wald, Harkader & Ross for appointment of counsel fees	
May 15-72	Filed supplemental of A. Paul Victor to correct an incorrect case No. of his affdvt executed on 5-8-72	
May 15-72	Filed Objections of the 20 Objectors represented by Mesirov, Gelman, Jaffe & Levin to the proposed settlement & their brief in support thereof	
May15-72	Filed Objections of Bay Fair Shopping Center, Friendswood Development Co., Garc Plaza Corp., Humble Oil & Refining Co., Int'l Lubricant Corp. & Shell Oil Co. to all applications for counsel fees & Costs	
May 15-72	Filed Howrey, Simon, Baker & Murchison notice of intention to appear as counsel for Bay Fair Shopping Center, Friendswood Development Co. et al	
May 15-72	Filed Claimant 20th Century Fox Film Corp. consent to proposed plan of Allocation of Settlement Fund & objection to petition for award of counsel fees	
May 15-72	Filed Botein, Hays, Sklar & Herzberg notice of intention to be heard at hearing on 5-24-72 on behalf of claimants Hart, Shaffner & Marx & other claimants liste on attached schedule	
May 15-72	Filed affdvt of Nathaniel Whitehorn (of firm of Botein, Hays, Sklar & Herzberg) in opposition to proposed settlement of this class action & in opposition to application by counsel for the class for an allowance of counsel fees in amt. of 25% of the settlement fund	
May 18-72	Filed Class Representative pltffs' answer to motion of the Commercial & Industrial class members represented by Mesirov, Gelman, Jaffe & Levin to postpone the settlement hearing	
May 22-72	Filed deft American Dist. Telegraph Co. affdvt & notice of motion to quash subpoe	
May 22-72	Filed reply affdvt of Herbert Robinson to Application of Wald, Harkrader & Ross for apportionment of counsel fees	
May 23-72	Filed Memorandum of American Cyanamid Co. & Shulton Inc. in opposition to petition of counsel for the class representatives for award of counsel fees & costs	
May 23-72	Filed Notice of Intention to Appear of Donovan, Leisure, Newton & Irvine to determi the fairness of the Settlement agreement & the propriety of counsel fees request by counsel for the class representatives	
	(cont'd on p. 5)	

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	PROCEEDINGS	Date Order or Judgment Noted
-72	Filed - in 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028 - Memorandum of R.J. Reynolds Industries in opposition to Request for Attorneys Fees.	
-72	Filed - in 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028 - on 2/22/72 Filed Motion of Commercial and Industrial Members of Classes re: Modify Court's Settlement Order No. One. - MEMO. END. (on 3/23/72) The motion to extend time to file the written election to be excluded from the class actions is denied. The motion was argued on 3/2/72 and at that time the Court indicated this result. etc.etc. Problems regarding the settlement may be presented and determined in the proceedings concerned with that issue. So ordered. Metzner, J. (mailed notice).	
72	Filed Affidavit of Service of Notice of Appearance of Lord, Day & Lord, Memorandum in support of Approval of Settlement, etc. Filed Notice of Appearance by Lord, Day & Lord, for counsel David Berger, Esq. and David Berger, P.A., counsel for class representatives in each of the cases 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028	
-72	Filed in 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028 Memorandum on behalf of all defts. in support of the proposed settlement (for 6 Defendants' Affidavits in support of proposed settlement. Objections to Proposed Settlement and Petition for Award of Costs and Attorneys' Fees by Fran Stef Corporation. Memorandum in support of approval of proposed settlement. Petitioner's Reply Memorandum in support of his request for attorneys' fees and contra objections thereto. Affidavit in oppositionto application by Parker, Chapin & Flattau, etal for attorneys fees. Memorandum of American Cyanamid Co. and Shulton Inc. in opposition to petition of counsel for Class representatives for Award of Counsel Fees and Costs. Memorandum on behalf of all defendants in support of the proposed settlement in 68 Civ. 4027). Filed Affidavit of Robert O. Donnelly in support of proposed settlement. " Objections to Proposed Settlement and Petition for award of Costs and attorneys' fees by Fran Stef Corp. " Memorandum in support of approval of proposed settlement (David Berger). " Petitioner's Reply Memorandum in support of his request for attorneys' fees and contra objections thereto. " Affidavit of David Berger, Esq. in opposition to application by Parker, Chapin & Flattau, etal for attorneys fees.	
24-72	Filed Affidavit of Service of Defts' Memorandum in support of Proposed Settlement and accompanying affidavits of Robert O. Donnelly upon many parties on 5/2 in 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028.	
25-72	Filed affdvt of Henry Silbernerg (firm of Stroock & Stroock & Lavan for claimants Eudrest Corp. et al) in opposition to petition of counsel for class action representatives for the award of counsel fees	
26-72	Filed affdvt of A. Paul Victor submitted to correct the statement made in 5(c) of original affdvt.	
30-72	Filed Bay Fair Shopping Center et al Response to "petitioner's reply memorandum in support of his request for attys' fees & contra objections thereto"	
31-72	Filed affdvt of service by mail on 5-31 of an affdvt objecting to petition for counsel fees on Cahill, Gordon et al	
ne 2-72	Filed affdvt of Harry Garfinkel (Appeal Printing Co.) to comply with the requirements of paragraph 8 of settlement order No. 1 requiring an affdvt of service & affdvt of Joseph M. Burke (deft Automatic Fire Alarm Co.) with respect to mailing of class	

1225 Vine St. Bldg. vs Grinell Corp. et al 68 CIV 4027

Civil Docket Continuation

DATE	PROCEEDINGS	Dr. Jud.
5-72	Before Metzner, J. Hearing for attys. fees held & concluded-Dec. Res.	
7-72	Filed affdvt of David Shapiro (Atty. for pltffs' in 68-2787)	
21-73	Filed notice of change of address for deft's atty.	
c.27-72	Filed Opinion #39061: The settlement of the claims embraced in the 3 nat'l class actions are approved. I subscribe to the principle, that counsel who contributed to the benefit conferred on the class are entitled to compensation for that effort. Counsel will be, advised of the date for a hearing on the application for an, apportionment of the fee allowed for services rendered in obtaining, a settlement of the national class actions. So ordered. Metzner, J.	
Jan.23-73	Filed memorandum on behaof of all deft's in support of the proposed settlement. (in 68 Civ 4026-4027 & 4028. (CCS&R	
Jan.23-73	Filed deft's affidavits in support of proposed settlement.	
Jan.23-73	Filed affidavit of H. Laddie Montague, Jr. re: Statement of Claim #2.	
Jan.23-73	Filed affidavit of mailing of notice.	
Jan.23-73	Filed objections to proposed settlement & petition for award of costs & attorneys fees by Fran Stef Corp. (MEL & SLC)	
Jan.23-73	Filed Memorandum in support of approval of proposed settlement. (DB& HLMJr.)	
Jan.23-73	Filed affidavit of H. Laddie Montague, Jr. Re Statements of Claim #1.	
Jan.23-73	Filed Appendix "C" list of Entries of Appearance.	
Jan.23-73	Filed Appendix "D" List of Written Exclusions from these class action mailed on or before 1-26-72.	
Jan.23-73	Filed Memorandum of R.J. Reynolds Industries in opposition to, request for attorneys fees. (DP&M)	
Jan.23-73	Filed Notice of Motion to reduce legal fees & delay settlement (CW&T)	
Jan.23-73	Filed Memorandum of law of members of Pltf. Commercial Class in, support of motion to reduce legal fees & to delay settlement. (Amended) (CW&T)	
Jan.23-73	Filed Petitioner's reply Memorandum in support of his request for, Attorneys fees & contra objections thereto.	
Jan.23-73	Filed Memorandum of Claimants General Motors Corp., etal & Ford, Motor Co. etal in opposition to petition for counsel fees.	
Jan.23-73	Filed Notice of intention to be heard. (MEL & SLC)	
Jan.23-73	Filed Memorandum of counsel for the class representatives in support of their petition for counsel fees & costs. (DB & HLM, Jr.)	
Jan.23-73	Filed Petition of counsel for the class representatives for award, of counsel fees & costs. (DB)	
Jan.23-73	Filed FINAL JUDGMENT. The claims (as defined in paragraph 2 herein) of each & every member of the class (as defined in paragraph 1, herein) are dismissed with prejudice & without costs, & each member. of the class is forever barred & permanently enjoined from, instituting or maintaining any action on or a asserting in any way the said claims as against any and all of the said deft's. Said deft's are discharged from any & all liability to any & all members. of the class in respect to any & all claims described in paragraphs, 2 & 3 hereof, except as to their obligations under the settlement. Agreement approved by this court, This court retains jurisdiction, of this matter for the purpose of ascertaining that all parties, perform & discharge their obligations under the settlement &, agreement & enforcement thereof. etc. Metzner, J. Judg. Ent. Clerk Mailed notice. (Also in 68 Civ 4026, 68 Civ 4028. Ent. 1-24-73.	

Cont'd on page #7

225 Vine Street Building, Inc, etal .vs. Grinrll Corp, etal 68 Ci

: Civ 4027

Page #7

DATE	PROCEEDINGS	Date Order o Judgment Not
.25-73	Filed Final Judgment: Ordered that Counsel for the class representatives. David Berger & David Berger, P.A., Attorneys at law are allowed, $14,914.73 as out-of pocket litigation expenses to 4-20-72 to be paid from initial installment of the settlement fund; Ordered , counsel for the class representatives is awarded attys fees in the, amt. of $1,500.000. to be paid from the settlement fund. This court, retains jurisdiction for the purpose of (1) determining the petitions, of Weil, Gotshal & Manges: Liebman, Eulau, Robinson & Perlman & , . Parker, Chapin & Flattau and (2) of Wald, Harkrader & Ross for an, apportionment of the attys fee awarded to the class representatives , and (b) determining the manner & time of payment of said fees: (c) determining further allowance & out-of-pocket expenses to, counsel for the class representatives. Metzner, J. (Also in 68-4026, 68-4028.	
n.29-73	Filed Notice of Appeal by Bay Fair Shopping Center; Exxon Corp. successor by merger to the Humble Oil & Refining Co.; Friendwood Development Co., Garden State Plaza Corp., International Lubricant Corp. and Shell Oil Co., claimants herein. (Also in 68 Civ. 4026 and 68 Civ. 4028) (mailed notice).	
b.1-73	Filed Amended Notice of Appeal by Bay Fair Shopping Center; Exxon Corp. successor by merger to the Humble Oil & Refining Co.; Friendwood Development Co., Garden State Plaza Corp., International Lubricant Corp. and Shell Oil Co., claimants herein. (Also in 68 Civ. 4026 and 68 Civ. 4028) (mailed notice).	
eb.5-73	Filed copy of Judgment filed 1/23/73 with notice of entry.	
eb.9-73	Filed Description of Parts of Transcript pur. to Rule 10(b) Fed.R.App.P. to be included in Record and Statement of Issues. (Also docketed in M 19-92).	
eb.8-73	Filed ORDER theat J. C. Penney Co. Inc. and Hutzler Brothers Co. be added to Schedule "A" annexed to the Final Judgment as persons who are excluded from the Class described in paragraph 1 of the Final Judgment. Metzner, J. (mailed notice).	
b.16-73	Filed Affidavit in opposition to petition for Award of Counsel Fees. (Also Docketed in M 19-92) (And in 2 related cases).	
eb.16-73	Filed letter from Trubin Sillcocks Edelman & Knapp - objecting to the excessive counsel fees in these 3 related cases.	
eb.16-73	Filed AMENDED NOTICE OF APPEAL (Amendment to Prior Notice of Appeal by Bay Fair Shopping Center, Exxon Corp., successor by merger to the Humble Oil & Refining Co., Friendswood Development Co., Garden State Plaza Corp., International Lubricant Corp. and Shell Oil Co. (mailed notice) in 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 402	
eb.20-73	Filed Notice of Appeal by Supermarkets General Corp.,; Shop-Rite of Clark, Inc. Shop-Rite of Madison Twp. Inc., and additional claimants (see entry in M-19-92 (mailed copies - labels for service list provided).	
eb.1?-73	Filed Notice of Appeal by Alden Industries, Inc., Clifton Yarn Mills, Inc., et a (additional claimant (see entry in M 19-92)	
eb.21-73	Filed Bond for Costs on Appeal by Alden Industries, Inc. and 19 other claimants ($250, Reliance Insurance Co.).	

CIVIL 4028

Manhattan-Ward, Inc., et al vs.
Grinnell Corp., et al

68 CIVIL 4028

	PROCEEDINGS	Date Order or Judgment No.
11-68	Papers originally filed in Eastern District of Penna., Phila., Pa. here this day filed: Complaint, summons. Jury demand: Motion for leave to intervene as pty. pltf; order continuing argument on motion to intervene for 15 days; return on summons; Defts. motion for order to preserve status quo; Defts. Memorandum in support of motion; Order staying proceedings for 60 days; Order extending time for defts. to answer; Transcript. ANSWER of Automatic Fire Alarm Co. of Del.; ANSWER of Grinnell Dist. Telegraph Co.; ANSWER of Holmes Electric Protective Co.; Notice listing case for trial; Jury trial demanded by Holmes Elec. Pro. Co.; copy of order staying all proceedings for 30 days; certified copy of order transferring to S.D.N.Y.; certified copy of docket entries.	
	RECORD OF PROCEEDINGS - S.D.N.Y.	
10-69	Filed Notice of Motion Ret. Room [illegible] [illegible], J. Determine that these actions may not be maintained as class actions (Filed in 68 Civil 4026) (date to be set) (date to be set)	
10-69	Filed Notice of motion re: partial summary judgment. Ret. Room 2201 before Metzner, J. date to be set by the Court (Filed in 67 Civ. 2249) ([illegible]	
10-69	Filed Defendants Interrogatories. "	
10-69	Filed Notice of motion re: partial summary judgment. Ret. 2201 before Metzner, J. date to be set by the Court (Filed in 67 Civ. 2591) ([illegible])	
7-69	Filed Notice of Motion Ret. before Metzner, J. date to be set by the court re; [illegible]	
-69	Filed Affidavit of Service of Notice of Motion.	
-69	Filed Affidavit of Herbert H. [illegible].	
-69	Filed pltfs'. Memorandum of Law in support of motion to amend complaint.	
28-69	Filed Opposing Affidavit to the motion by pltfs. to amend their complaints and add AFA as a deft. to the extent that the motion of Automatic Fire Alarm Co. of Delaware (AFADEL) to dismiss the complaints. (Filed in N 19-92) " " "	
28-69	Filed Opposing Memorandum on behalf of Automatic Fire Alarm Co.	
.19-69	Filed OPINION #36156, Metzner, J. Automatic Fire Alarm motion is granted. So ordered. (mailed notice) Filed in 68 Civil 2789.	
.22-69	Filed MEMO. END. on motion papers filed 7/7/69. This motion granted See opinion filed this day (9/19/69) in Damon Alarm Corp., et al vs. American District Telegraph, et al 68 Civil 2789. Metzner, J. So ordered.	
.1-69	Filed MEMO. END. on Show Cause filed 9/[illegible]/69. Motion withdrawn. So ordered. Edelstein, J.	
.22-69	Filed (in court) Memorandum opposition to pltfs' motion.	
.22-69	Filed (in court) Attorney's Affirmation.	
.30-69	Filed (in court) Affidavit in support of request to withdraw motion.	
.27-69	Filed stipulation and order substituting Ewing, [illegible], Dornell & Wayner as attorneys for Automatic Fire Alarm Co. of Delaware, in place and stead of Stickles, Hayden, Kennedy, Hort & Van Steenburgh. So ordered. Clerk.	
.20-70	Filed pltff's objections to deft's Interrogs.	
7 71	Filed pltffs' joint brief in support of National Class Actions.	
26-71	Filed affdvt of William [illegible] (for deft American District Telegraph Co.) in opposition to class action allegations of complaints	
26-71	Filed defts' memorandum in opposition to maintenance of these suits as national class actions	
pr.1-71	Filed pltff's joint reply memorandum in support of maintenance of these suits as national class actions.	
pr.1-71	Filed affidavit of H.L. Montague, Jr. in support of National Class actions.	
18-71	Before Metzner, J.--Dec. Reserved	
16-71	Filed Intervenor Courtland [illegible] motion & proposed complaint to intervene as party pltff R.D. 7-20-71 before Metzner, J. [illegible]	
-71	Filed [illegible] in [illegible] to [illegible].	

D. C. 110 Rev. Civil Docket Continuation page 2

DATE	PROCEEDINGS
Dec 13-71	Filed SETTLEMENT ORDER NO. 1---Ordered that all discovery & other pre trial procee in the actions except only proceedings as specifically provided in settlement agreement are stayed for purpose of settlement only. Motion of pltffs' to have these actions maintained as class actions are hereby granted & that class in civ actions be defined as indicated. A Committee shall be formed to supervise & carry out provisions of this order including notice to members of these classe. Defts' shall bear all expenses incurred by the Committee in connection with such notices. All other expenses will be paid out of the settlement fund. The last d for prospective members of the class to file requests for exclusion shall be 2-10-72. A hearing shall be held 4-27-72 in rm. 1105 for purpose of determinin whether the settlement agreement etc. shall be approved & these actions discont with prejudice & whether application for the attys. fees etc. shall be approve. Class members wishing to file their objections must do so before 4-13-72 in wri with Clerk of this Cout-Metzner, J. m/n
Dec 13-71	Filed David Berger et al preliminary memorandum in support of award of attys. fees from class actions' settlement fund (Filed in 68-4026)
Feb 26-71	Filed defts' affdvts' in opposition to maintenance of these suits as national cla actions
Dec 14-71	Filed memo endorsed on motion filed 6-9-69---This motion is disposed of in accord with settlement order #1 in this action signed today-so ordered-Metzner, J.
Dec 14-71	Filed memo endorsed on motion filed 6-10-69---This motion is disposed of in accor with settlement Order #1 signed today-So ordered-Metzner, J
Dec 14-71	Filed memo endorsed on 7-16-71---This motion to intervene is disposed of in accor with settlement order #1 in this action today-So odered-Metzner, J.
Dec 15-71	Filed affdvt of Wm. Halpin (Vice-Pres-Finance of deft American Dist. Telegraph) re removing various names from the list
Dec 16-71	Filed affdvt of Frank Fritz (Holmes ProtectionInc.) pursuant to settlement order
Dec 16-71	Filed affdvt of Lawrence W. Thomason (Pres. of AFA Protective Systems Inc.) pursu to paragraph 6(a) of settlement order No. 1
Dec 28-71	Filed affdvt of Lawrence W. Thomason (for AFA Protective Systems Inc.)in accordan with paragraph of Settlement Order No. 1 with Exhibit 1 attached
29-71	Filed brief of defts' in support of paragraph No. 4 of settlement order No. 1
Jan 11-72	Filed D. Reiner Inc. Authorization to retain Gerstenhaber & Diamond Esqs. to app as its attys. & to attend all meetings in connection with above matter
Jan 10-72	Filed affdvt of Mailing to list of Customers in accordance with paragraph 8 of settlement order No. 1 signed by Metzner, J. (Filed in 68-4026)
Jan 14-72	Filed stipulation among counsel for class representative pltffs' & counsel for d that the attys. as indicated shall constitute a class action committee as prov for in paragraph 3 of settlement order No. 1-Metzner, J.
Jan 17-72	Filed Acknowledgment of receipt by mail of notice of exclusion
Jan 24-72	Filed Hutzler Bros. Election to be excluded from class of pltffs' purs. to provisio of para. 1 & 3 of notice of 12-13-71
Jan 24-72	Filed J.C. Penny Co. Inc. Election to be excluded from class of pltffs' purs. to provisions of para 1 & 3 of notice of 12-13-71
Jan 25-72	Filed Election of R.H. Macy & Co. Inc. to be excluded from class actions
Jan 26-72	Filed letter of Hughes, Hubbard & Reed to Clerk of Court dated 1-26-72 re notice of appearance
Jan 26-72	Filed notice of appearance of Hughes, Hubbard & Reed for Ford Motor Co., Ford Leasing Development Co., Philco Distributors Inc. & Philco-Ford Corp.
Jan 28-72	Filed letter of Cahill, Gordon, Sonnett, Reindel & Ohl dated 1-19-72 to Metzner, J. enclosing affdvts. of publication executed by NY Times & Wall St. Journal
[illegible]	Filed Transcript of record of proceedings, dated [illegible]
Feb 10-72	Filed Mesirov, Gelman, Jaffe & Levin entry of appearance for additional Commercial & Industrial members of classes of pltffs' as indicated
Feb 10-72	Filed Mesirov, Gelman, Jaffe & Levin motion of the Twenty Commercial & Industrial me of classes of pltffs' named in the entry of appearances filed by Mesirov

ATE	PROCEEDINGS	Date Order Judgment No.
10-72	Filed Mesirov, Gelman, Jaffe & Levin ~~motion~~ memorandum in support of its motion to	
	compel discovery on the proposed settlement issues	
10-72	Filed notice of appearance for pltff Agway Inc. by attys. Regan, Goldfarb, Powell & Quinn	
10-72	Filed notice of appearance for claimant Alexander's Inc. by Trubin, Sillcocks, Edelman, Kn	
10-72	Filed memorandum of class representatives pltffs' in opposition to motion of 20 days	
	Commercial & Industrial class members to compel discovery on proposed settl. issues	
22-72	Filed motion of commercial & Industrial members of classes of pltffs' named in entry of	
	of Mesirov, Gelman, Jaffe & Levin dated 1-19-72 & filed in these actions to modify the	
	Court's settlement order No. 1	
28-72	Filed Movants' reply to pltffs' memorandum in opposition to motion of twenty commercial	
	& industrial class members represented by Mesorov, Gelman, Jaffe & Levin to compel	
	discovery on the proposed settlement	
	Filed Supplemental memorandum of class representatives Contra Motion of twenty	
1-72	commercial & industrial class members to compel discovery on the proposed discovery	
	issues	
3-72	Filed ~~Lett~~ 41 Folders containing challenge claims numbered as follows: Claims Nos.	
	1 thru 2780; Claims Nos. 2800 thru 2031; Claims Nos. 4000 to 4217	
3-72	Filed Letter from David Berger, of class action Committee re: above challenge	
	letters & claims	
21-72	Filed entry of appearance of Stuart H. Rome on behalf of Grater Baltimore Medical Cent.	
4-72	Filed Letter of White & Case to Metzner, J. on behalf of all defts' in support of	
	the proposed settlement order No. 2	
4-72	Filed affdvt of H. Laddie Montague (for class representatives) in support of request	
	for an extension of time to file certain papers previously required to be filed	
	on 3-21-72	
4-72	Filed SETTLEMENT ORDER NO. 2--Ordered that paragraphs 11(b) & 12 of Settlement Order	
	No. 1 are amended to extent that the time within which the class action Committee	
	is to file an affdvt setting forth the name, address & amount of the claim of each	
	member of any of the classes is adj. from 3-21-72 to 4-21-72 in rm 1105; paragraph	
	13 of settlement order No. 1 is amended to provide that the hearing on the approval	
	of the settlement agreement, plan of allocation & application for attys. fees &	
	disbursements scheduled for 4-27-72 in rm 1105 is adj. until 5-24-72 in rm 35	
	at 4:30 PM etc. etc. Metzner, J.	
.21-72	Filed Affidavit of H. Laddie Montague, Jr. re: Statements of Claim.	
.21-72	Filed Appendix "C" List of Entries of Appearance.	
.21-72	Filed Appendix "D" List of Written Exclusions from these class actions, mailed on	
	or before 1/26/72.	
.21-72	Filed Petition for Counsel for The Class Representatives for Award of Counsel	
	Fees and Costs.	
.21-72	Filed Memorandum of Counsel for The Class Representatives in support of their	
	petition for Counsel Fees and Costs.	
.21-72	Filed Plan of Allocation of Settlement Fund.	
21-72	Filed Appendix "A" list of claimants by claim number, amt. of claim & challenges	
21-72	Filed Appendix "B" Alphabetical List of Claimants	
25-72	Filed stip & order that motion to reduce legal fees & to delay proposed settlement	
	in these cases is adj. from 4-27-72 to 5-24-72 at 4:30PM in rm 35-So ordered-Metzner	
26-72	Filed Pritchard, McCall, & Jones application for allowance of attys. fees for services	
	rendered in representing pltffs' Pizitz Inc. et al in Civ. Action 67-471,	
	Northern Dist. of Alabama	
May 11-72	Filed affdvt of Alvin Stein, A. Paul Victor & Herbert Robinson re award of counsel	
	fees in within actions in a sum not in excess of 20% of gross settlement etc.	
May 11-72	Filed Liebman, Eulau, Robinson & Perlman memorandum of law in support of application	
	to limit & apportion counsel fees	
May 12-72	Filed Humble Oil & Refining Co., Int. Lubricant Corp. & Shell Oil Corp. et al	
	Notice of Motion & motion for an order setting an evidentiary hearing on 5-24-	
	on the issues raised by	

17

DATE	PROCEEDINGS
May 12-72	Filed Memorandum of Claimants General Motors Corp. et al & Ford Motor Co. et al in opposition to petition for councl fees
May 12-72	Filed affdvt in opposition to petition of counsel forclass representatives for award of counsel fees & Costs
May 12-72	Filed Notice of Claimants General Motors Corp., General Motors Acceptance Corp., Fo Motor Co., Ford Leasing Development Co., Philco-Ford Corp. & Philco-Ford Distributors Inc. - of intention to appear
May 12-72	Filed defts' Grinell Corp. et al opposing memorandum to motion of alleged commerc industrial class members to postpone the settlement & fee hearing scheduled fo r 5-24-72
May 12-72	Filed Townley, Updike, Carter & Rodgers notice of appearance & intention to be heard for the Mead Corp., a member of the class in the actions
May 12-72	Filed Mead Corp. supplemental memorandum in support of acceptance of the amended claim #1551
May 12-72	Filed Emigrant Savings Bank statement of objections to award of costs & attys. fees
May 15-72	Filed Application of Wald, Harkrader & Ross for appointment of cousel fees
May 15-72	Filed Supplemental affdvt of A. Paul Victor to correct an incorrect case No. of his affdvt executed on 5-6-72
May 15-72	Filed Objections of the 20 objectors represented by Mesirov, Gelman, Jaffe & Levin to the proposed settlement & their brief in support thereof
May 15-72	Filed Objections of Bay Fair Shopping Center, Friendswood Development Co., Garden Plaza Corp., Humble Oil & Refining Co., Int'l Lubricant Corp. & Shell Oil Co. to all applications for counsel fees & costs
May 15-72	Filed Howrey, Simon, Baker & Murchison notice of intention to appear as counsel fo Bay Fair Shopping Center, Friendswood Development co. et al
May 15-72	Filed 20th Century-Fox Film Corp. consent to proposed plan of Allocation of Settlement Fund & objection to petition for award of counsel fees
May 15-72	Filed Botein, Hays, Sklar & Herzberg notice of intention to be heard at hearing on 5-24-72 on behalf of claimants Hart, Shaffner & Marx & other claimants listedon attached schedule
May 15-72	Filed affdvt of Nathaniel Whitehorn (member of firm of Botein, Hays, Sklar & Herz in opposition to proposed settlement of this class action & in opposition to application by counsel for the class for an allowance of counsel fees in amt. of 25% of thesettlement fund
May 18-72	Fild Class Representatives pltffs' answer to motion of the Commercial & Industrial class members represented by Mesirov, Gelman, Jaffe & Levin to postpone settleme
May 22-72	Filed deft American Dist. telegraph Co. affdvt & notice of motion to quash subpo
May 22-72	Filed deft American Dist. Telegraph Co. affdvt & notice of motion to quash subpo
May 22-72	Filed reply affdvt of Herbert Robinsonto Application of Wald, Harkrader & Ross fo appointment of counsel fees
May 23-72	Filed Memorandum of American Cyanamid Co. & Shulton Inc. in opposition to petitio of counsel for the class representatives for award of counsel fees & costs
May 23-72	Filed Notice of Intention to Appear of Donovan, Leisure, Newton & Irvine to determi the fairness of the settlement agreement & the propriety of counsel fees reques by counsel for the class representatives
May 23-72	Filed Memorandum of R.J. Reynolds Industries in opposition to request for attys.
May 23-72	Filed Motion of Commercial & Industrial members of classes re: modify court's settlement Order No. 1 on 2-22-72
May 23-72	Filed Memo Endorsed on motion filed 2-22-72---Motion to extend time to file the written election to be excluded from the class actions is denied. Motion was argued on 3-2-72 & at that time the Court indicated this result etc. etc.. Prob regarding the settlement may be presented & determined in the proceedings concerned with that issue-So ordered-Metzner, J

(cont'd on pg 5)

page 5

DATE	PROCEEDINGS	Date of Judgment
y 24-72	Filed Affidavit of Service of Notice of Appearance of Lord, Day & Lord, Memorandum in support of Approval of Settlement, etc.	
	Filed Notice of Appearance by Lord, Day & Lord, for counsel David Berger, Esq. and David Berger, P.A., counsel for class representatives in each of the cases 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028	
y 24-72	Filed in 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028	
	Memorandum on behalf of all defts. in support of the proposed settlement(for	
	Defendants' Affidavits in support of proposed settlement.	
	Objections to Proposed Settlement and Petition for Award of Costs and Attorneys' Fees by Fran Stef Corporation.	
	Memorandum in support of approval of proposed settlement.	
	Petitioner's Reply Memorandum in support of his request for attorneys' fees and contra objections thereto.	
	Affidavit in oppositionto application by Parker, Chapin & Flattau, etal for attorneys fees.	
	Memorandum of American Cyanamid Co. and Shulton Inc. in opposition to petition of counsel for Class representatives for Award of Counsel Fees and Costs.	
	Memorandum on behalf of all defendants in support of the proposed settlement in 68 Civ. 4027).	
	Filed Affidavit of Robert O. Donnelly in support of proposed settlement.	
	" Objections to Proposed Settlement and Petition for Award of Costs and attorneys' fees by Fran Stef Corp.	
	" Memorandum in support of approval of proposed settlement (David Berger).	
	" Petitioner's Reply Memorandum in support of his request for attorneys' fees and contra objections thereto.	
	" Affidavit of David Berger, Esq. in opposition to application by Parker, Chapin & Flattau, etal for attorneys fees.	
y 24-72	Filed Affidavit of Service of Defts' Memorandum in support of Proposed Settlement and accompanying affidavits of Robert O. Donnelly upon many parties on 5/2 in 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028.	
ay 25-72	Filed affdvt of Henry Silbermorg (firm of Stroock & Stroock & Lavan-for claimants Sucrest Corp. et al in oppositi on to petition of counsel for class action representatives for the award of couns el fees	
y 26-72	Filed affdvt of A. Paul Victor submitted to correct the statement made in 5(c) of original affdvt	
y30-72	Filed Bay Fair Shopping Center et al to "petitioner's reply memorandum in support of his request for attys' fees & contra objections thereto"	
y 31-72	Filed affdvt of service by mail on 5-31 of an affdvt objecting to petition for counse fees on Chrill.Gordon et al	
ne 2-72	Filed affdvt of Harry Girfinkel (Appeal Printing Co.) to comply with the requirements of paragraph 3 of Settlement Order No. 1 requiring an affdvt of service & affdvt ofJoseph M. Burke (deft Automatic Fire Alarm Co.) with respect to mailing of the class notices	
ne 7-72	Filed affdvt of David Shapiro (atty. for pltffs' in 68-2789)	
ne 5-72	Before Metzner, J. Hearing for attys. fees held & concluded-Dec. Res.	
.21-72	Filed Notice of change of address of Howrey, Simon, Baker & Murchison, to 1730 Pennsylvania Ave.N.W., Washington, D.C. 20006 Tel.(202) 872-8800.	
27-72	Filed Affidavit & Notice of Motion by pltffs atty, David Berger for an order pursuant to Rule 45 (b) calling for production of documents at the settlement hearing scheduled herein on for May 24th, 1972, as indicated.	
27-72	Filed memo endorsed on notice of motion to quash subpoena filed May 22, 1972 Motion granted. So ordered. Metzner, J.	

Continued on Page 6

WARD, INC. ET-AL VS. GRINNELL CORP. ET AL

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Dr. Judg.
c27-72	Filed memo endorsed on Notice of Motion filed May 12th, 1972. This motion is denied. See decision & opinion filed this day approving settlement and fixing counsel fee. So Ordered. Metzner, J.	
7-72	Filed Motion of the Commercial and Industrial Class members etc. to postpone settlement hearing, as indicated.	
27-72	Filed memo endorsed on motion filed Dec 27th, 1972. This motion to adjourn settlement hearing is denied. Metzner, J.	
27-72	Filed memo endorsed on motion filed Feb 10th, 1972: The decision on this motion was reserved after arguement pending the later disposition of the motion, to appro the settlement. After argument of that motion the settlement was approved. See opinion filed to-day in that matter,. This motion is denied. So ordered. Metzner, J.	
Dec27-72	Filed memorandum in opposition to motion to compel discovery (pretrial), by attys for defts Grinnell Corp. District Telegraph Co., Holmes Electric Protective and Automatic Fire Alarm Company.	
Dec27-72	Filed Opinion # 39061 : The settlement of the claims embraced in the 3 natl class actions are approved. I subscribe to the principle that counsel who contributed to the benefit conferred on the class are entitled to compensation for that effort. Counsel will be advised of the date for a hearing on the application for an apportionment of the fee allowed for services rendered in obtaining a settlement of the national class actions. So ordered. Metzner, J. M/N.	
Jan23-73	Filed memorandum on behalf of all defts in support of the proposed settlement in	6c-
23-73	Filed defts affidavits in support of proposed settlement. CGS&R	4,027
n23-73	Filed Affidavit of H. Laddie Montague Jr. re; Statements of Claim #2	
23-73	Filed affidavit of mailing of Notice.	
23-73	Filed objections to proposed settlement and petition for award of Costs and attorneys fees. by Fran Stef Corp.	
23-73	Filed memorandum in support of approval of proposed settlement. (DD & HLM JR.	
23-73	Filed Affidavit of H. Laddie Montague Jr. re statements of Claim ~~#2x~~ No. 1	
23-73	Filed Appendix "C" List of Entries of Appearance.	
-73	Filed Appendix "D" List of Written Exclusions from these class actions, mailed on or before 1-25-72.	
-73	Filed memorandum of R.J. Reynolds Industries in Opposition to request for attorneys	
-73	Filed Notice of Motion to reduce legal fees and delay settlement. (CW&T)	
23-73	Filed Memorandum of Law of Members of pltff Commercial Class in support of motion to reduce legal fees and to delay settlement (Amended) (CW&T)	
Jan23-73	Filed petitioners Reply memorandum in support of his request for attys fees and objections thereto.	
Jan23-73	Filed Memorandum of Claimants General Motors Corp. et al and Ford Motor Co. in opposition to petition for counsel fees.	
n23-73	Filed Notice of Intention to be heard. M&L &SLC	
n23-73	Filed Memorandum of Counsel for the Class representatives in support of their petit for counsel fees and costs. (DD& HLM JR.)	
n23-73	Filed Petition of counsel for the Class Representatives for award of counsel fees and costs.	
23-73	Filed FINAL JUDGMENT: The claims (as defined in paragraph 2 herein) of each and every member of the Class (as defined in par 1 herein) are dismissed with prejudice and wi costs and each member of the Class is forever barred and permanently enjoined from instituting or maintaining any action on or asserting in anyway the said Claims as any and all of the said defts: Said defts are discharged from any and all liability to and all members of the Class in respect to any and all Claims described in pars 2 hereof except as to their obligations under the settlement Agreement approved by this This Court retains jurisdiction of this matter for the purpose of ascertaining that perform and discharge their obligations under the Settlement and Agreement and enfor thereof etc. Metzner, J. Judgment ent. 1-23-73 Ent 1-24-73 M/N Also entered in 68-civ 4027 and 68-Civ 4026.	

DATE	PROCEEDINGS	Date Judg
an26-73	Filed Final Judgment. ORDERED THAT COUNSEL FOR THE Class representatives, David Berger, P.A. Attorneys at Law are allowed, $14, 914.73 as out of pocket litigation expenses to be paid for initial installment of the Settlement Fund, Ordered Counsel for the Class Representatives is awardedattorneys fees in the amount of $1,500,000 to be paid from the settlement Fund. This Court retains jurisdiction for the purpose of (a) determining the petitions of Weil, Gotsahl & Manges:, Liebman, Eulau, Robinson, & Perl man and Parker, Chapin & Flattaum and (2) of Wald, Karkrader & Ross for an apportionment of the attorneysfee award to tthe Class Representatives :. and (b) determining the manner and time of payment of said fees; (c) determining further allowance and out of pocket expenses to Counsel for the class representatives. Metzner, J. (Also in 68 Civ 4026&4027	(LE
n.29-73	Filed Notice of Appeal by Bay Fair Shopping Center; Exxon Corp. successor by merger to the Humble Oil& Refining Co.; Friendswood Development Co., Garden State Plaza Corp., International Lubricant Corp. and Shell Oil Co. claimants herein. (Also in 68 Civ. 4026 and 68 Civ. 4027). (mailed notice).	
Feb.1-73	Filed Amended Notice of Appeal by Bay Fair Shopping Center; Exxon Corp. successor by merger to the Humble Oil & Refining Co.; Friendswood Development Co., Garden State Plaza Corp., International Lubricant Corp. and Shell Oil Co. (mailed notice). Also in 68 Civ. 4026 and 68 Civ. 4027).	
eb.5-73	Filed copy of Judgment filed 1/23/73 withnotice of entry.	
eb.9-73	Filed Description of Parts of Transcript pur. to Rule 10(b) Fed R. App. P. to be included in Record and Statement of Issues. (Also docketed in M 19-92).	
eb.8-73	Filed Order that J.C.Penney Co.Inc. and Hutzler Brothers Co. be added to Schedule "A" annexed to the Final Judgment as persons who are exclused from the Class described in paragraph 1 of the Final Judgment.Metzner,J.(Mailed notice).	
eb.1[illegible]-73	Filed Affidavit in opposition to Petition for Award of Counsel Fees. (Docketed also in M 19-92) (Also in2 related cases).	
eb.16-73	Filed letter from Tubin Sillcocks Edelman & Knapp - objecting to the excessive counsel fees, in these 3 related cases.	
eb.16-73	Filed AMENDED NOTICE OF APPEAL(Amendment to Prior Notice of Appeal by Bay Fair Shopping Center, Exxon Corp., successor by merger to the Humble Oil & Refining Co., Friendswood Development Co., Garden State Plaza Corp., International Lubricant Corp. and Shell Oil Co. in 68 Civ. 4026, 68 Civ. 4027 and 68 Civ.4028). (mailed notice).	
eb.20-73	Filed Notice of Appeal by Supermarkets General Corp., Shop-Rite of Clark, Inc. Shop-Rite of Madison Twp. Inc., and additional claimants (see entry in M 19-92).	
eb.15-73	Filed Notice of Appeal by Alden Industries, Inc., Clifton Yarn Mills,Inc., et al (additional claimants see entry in M.19-92). (mailed copies)	
eb.21-73	Filed Bond for Costs on Appeal by Alden Industries, Inc. and 19 other claimants. ($250. Reliance Insurance Co.)	

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

CITY OF DETROIT :
CITY OF PHILADELPHIA

on behalf of themselves
and all others similarly situated,
Plaintiffs

v. : 68-1498

GRINNELL CORPORATION;
AMERICAN DISTRICT TELEGRAPH COMPANY;
HOLMES ELECTRIC PROTECTIVE COMPANY; and
AUTOMATIC FIRE ALARM COMPANY OF DELAWARE,
Defendants : JURY TRIAL DEMANDED

COMPLAINT

Plaintiffs, City of Detroit, City of Philadelphia complaining of the defendants, allege:

I

Jurisdiction and Venue

1. This action is brought against the defendants under Section 4 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, as amended (15 U.S.C. §15), commonly known as the Clayton Act, to recover treble damages and the cost of suit, including a reasonable attorney's fee, against the defendants for the injuries sustained by plaintiff by reason of defendants' violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended (15 U.S.C. §1 and §2), commonly known as the Sherman Act, as hereinafter alleged:

2. Each of the defendants is an inhabitant of, transacts business or is found within the Eastern District of Pennsylvania.

II
Plaintiffs

3. Plaintiff City of Philadelphia is a public body corporate in the Commonwealth of Pennsylvania. Plaintiff City of Detroit is a public body corporate in the State of Michigan. Hereinafter, plaintiffs will be collectively referred to as "plaintiff".

4. Plaintiff is representative of a class as defined by Rule 23 of the Federal Rules of Civil Procedure and brings this action on behalf of the entire class. The class consists of all state, county and local governments and public bodies, and public schools and school districts situated throughout the United States market which have purchased, directly or indirectly, the products described from one or more of the defendants in the period in suit and have sustained damages thereby as a result of the conspiracy herein alleged. The class is so numerous that joinder of all members is impracticable and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. There are questions of law and fact which are common to the class and which predominate over any questions affecting only individual members. The claims of plaintiff is typical of the claims of the class, and plaintiff will fairly and adequately protect the interests of the class.

5. Plaintiff is suing on account of all purchases of central station electric protection service and central station protection, as hereinafter described, which were made by it, and which were affected by the combination and conspiracy and monopoly hereinafter alleged:

III
Defendants

6. Each of the corporations listed below is made

a defendant herein. Each of the said corporations is organized and exists under the laws of the State indicated, has its principal place of business in the city indicated, and sells central station electric protection service and central station protection as hereinafter described:

Name	State of Incorporation	Principal Place of Business
Grinnell Corporation	Delaware	Providence, Rhode Island
American District Telegraph Company	New Jersey	New York, New York
Holmes Electric Protective Company	New York	New York, New York
Automatic Fire Alarm Company of Delaware	Delaware	New York, New York

7. Within the period of time covered by the complaint each of said defendants has engaged in the business of selling such services in various States of the United States.

8. Within such period Grinnell Corporation, hereinafter referred to as "Grinnell", engaged, among other things, in the manufacture and installation of automatic sprinkler systems, in the manufacture of protection devices, and, directly or through subsidiaries and affiliates, in the business of central station electric protection service.

9 Within such period American District Telegraph Company, hereinafter referred to as "ADT", had a large number of subsidiaries through which it engaged in the business of central station electric protection service throughout the United States and in Canada, and in the manufacture of protection devices. Approximately 75% of the common stock of ADT was owned by defendant Grinnell. References to ADT hereinafter include subsidiaries of ADT.

10. Within such period Holmes Electric Protective Company, hereinafter referred to as "Holmes", engaged, among other things, directly or through subsidiaries, in the business of central station electric protection service in New York, New York, Philadelphia, Pennsylvania, and Pittsburgh, Pennsylvania. Holmes was a wholly owned subsidiary of defendant Grinnell.

11. Within such period Automatic Fire Alarm Company of Delaware, hereinafter referred to as "AFA", engaged, among other things, directly or through subsidiaries, in the business of central station electric protection service in New York, New York, Philadelphia, Pennsylvania, and in Boston, Massachusetts. Through one of its subsidiaries said defendant engaged also in the manufacture of protection devices. Approximately 88% of the common stock of AFA was owned by defendant Grinnell.

IV

Co-Conspirators

12. Various other persons, firms and corporations not made defendants herein have participated as co-conspirators with the defendants in the violations hereinafter charged and have performed acts and made statements in furtherance thereof. Said co-conspirators include, but are not limited to, subsidiaries and affiliates of the defendants.

V

Definitions

13. Whenever any of the following terms shall be used in this Complaint it shall be deemed to have the meaning hereinafter defined:

(1) "Central station electric protection service" or "central station protection" means the business of supplying and installing protection devices on the premises of subscribers, maintaining such devices, and furnishing to subscribers protection from fire, burglary or other hazards, through central stations accredited for such service by insurance inspection and rating organizations (sometimes referred to as CSPS herein);

(2) "Central station" means an installation equipped with signal receiving devices connected by private telephone wires with protection devices installed on the premises of subscribers of central station electric protection service, and staffed by trained operators and guards at all times;

(3) "Protection devices" means detecting devices, coding devices, signal receiving devices, and special equipment and materials used in furnishing central station electric protection service.

VI

Trade and Commerce Involved

14. Ever increasing numbers of industrial plants, warehouses, retail stores, offices, and other commercial establishments have been subscribing to central station electric protection service, since the inception of such service in the latter part of the 19th Century. Such service has been recognized as a superior means of minimizing losses by fire, burglary, malfunction of machinery, negligence of personnel, and other hazards. Subscribers to such service whose protection systems have been installed according to approved standards received from insurers substantial discounts on hazard insurance premiums.

15. When a prospective subscriber requested central station protection service the central station protection company surveyed the premises to be protected and determined the number of protection devices required to install the protection system. The cost of the equipment installed and th cost of labor to install the equipment plus overhead expenses was called the installation charge. The installation charge was usually paid by the subscriber when the installation was completed. Title to the equipment installed in the subscriber's premises was retained by the central station protection company. The subscriber was then charged an annual service charge, payable periodically in advance, which was determined by the number of protection devices in service, telephone line rental costs, and anticipated service and maintenance requirements. The central station protection companies usually obtained contracts for protection service for periods of several years and if the contract was not renewed the central station protection company removed all of the protection devices installed in the subscriber's premises.

16. By settled practice, universal in the insurance business, underwriters of fire and burglary insurance (herein called "underwriters") allow a reduction of premiums to customers having approved protective signalling systems. To that end, underwriters have established testing laboratories, have adopted standards, have organized periodical inspections, and have offered premium discounts, of almost standard nature, based thereon. Discounts accorded to accredited central station service subscribers tend to be noticeably larger than for users of other systems.

17. The accredited central station business is marked out by the very patterns of the alarm company defendants, who are the dominant factors in the protective industry, as being an identifiably separate market.

18. The accredited, as distinguished from nonaccredited CSPS is a relevant part of commerce. Virtually the only central station companies in the status of the nonaccredited are those that have not yet been able to meet the standards established by the underwriters. The accredited central stations are those that have achieved, in the eyes of underwriters, superiorities that other central stations do not have. The accredited central station is located in a building of approved design, provided with an emergency lighting system and two alternate main power sources, manned constantly by at least a required minimum of operators, provided with a direct line to fire headquarters and, where possible, a direct line to a police station; and equipped with all the devices, circuits and equipment meeting the requirements of the underwriters. These standards are important as insurance carriers often require accredited central station service as a condition to writing insurance. Customers consider the unaccredited service as inferior.

19. Persons who are engaged in the protection service business recognize the accredited central station business as a separate type of business.

20. Insurance companies allow their insureds substantially larger premium reductions for accredited central station service than for other types of protective service. The annual charge paid by customers for accredited CSPS is more than for any other type of protection service.

21. There are trade associations uniting under one roof accredited central station protective service companies, and not including the generality of all types of automatic alarm systems.

22. In 1961 accredited companies in the central station service business grossed $65,000,000, over $57,000,000 of which was attributable to the alarm company defendants.

23. There exists a specific, separate, identifiable, recognized market limited to accredited central service protective systems operated by largely automatic devices.

24. Central station electric protection service can be rendered economically only if a substantial number of subscribers or potential subscribers are located in the vicinity of a central station. Extension of such service to subscribers located outside a certain radius is not practicable. Virtually all central stations were located in cities with more than 125,000 inhabitants.

25. Thirty-three central station protection companies were operating in the United States in 1959, which supplied central station protection service to over 94,000 subscribers in 119 cities throughout the United States. Over $6,000,000 worth of protection devices were used by the central station protection companies for installment of alarm systems in the premises of property owners in 1958, and the income derived from central station protection service in the United States in 1958 was in excess of $60,000,000.

26. Defendant ADT was and still is by far the largest central station protection company in the United States and the only central station protection company operating throughout the United States. At one time ADT operated 119 central stations in 114 cities (5 central stations in Chicago and 2 central stations in Cleveland) in 35 states and the District of Columbia. In the entire United States ADT does more central station protection business than all of its competitors combined. In 1958 ADT had 60,142 subscribers to central station protection service or about 64% of all subscribers in the United States, and it received $42,890,911 in annual service charges or about 72% of the earned revenues from central station protection service in the United States. In 88 cities in which it operates central stations ADT has no competition from other central station protection companies.

In 1961 ADT provided CSPS to 121 units (central stations), located, respectively, in 115 cities, which, in turn, were located, respectively, in 35 states and the District of Columbia. In 92 of those 115 cities ADT has no CSPS competition.

27. Defendant Holmes was and still is the second largest central station protection company in the United States and operates 11 central stations in the New York City area, 2 central stations in Philadelphia, Pennsylvania and 1 central station in Pittsburgh, Pennsylvania. In 1958 Holmes had 14,218 subscribers to central station protection service, or about 15% of all subscribers in the United States. It received $7,521,411 in annual service charges, or about 12% of the earned revenues from central station protection service in the United States.

In 1961 Holmes provided CSPS to 14 units (central stations), each located in one of three cities -- 11 in New York City, two in Philadelphia, and one in Pittsburgh.

28. Defendant AFA was and still is the third largest central station protection company in the United States, and operates central stations in New York City, Boston, Massachusetts, and Philadelphia, Pennsylvania. In 1958 AFA had 5, 167 subscribers to central station protection service or about 5% of all subscribers in the United States, and it received $3,324,662 in annual service charges or about 5% of the earned revenues from central station protection service in the United States.

29. ADT, Holmes, and AFA are the three largest compani in the CSPS business in terms of revenue. During the period 1957-61, defendants' share of the total national accredited CSPS market ranged from 87 percent to 91 percent; and ADT and Holmes had 87 percent to 90 percent of so much of the central station burglar alarm business as was "certificated" by all underwriters' laboratories.

30. Within the period of time covered by the complaint, defendant Grinnell controlled the defendants ADT, Holmes and AFA through stock ownership and interlocking directorates. Grinnell thus controlled 136 central stations out of a total of about 170 central stations existing in the United States in 1959. The Grinnell controlled companies, in 1959, together had about 79,500 subscribers to central station protection service or about 85% of the subscribers in the United States, and they received in combined annual service charges about $53,730,000 or about 90% of the total earned yearly revenues from central station protecti service in the United States.

In 1961, the alarm company defendants obtained revenues of more than $57,000,000 on account of CSPS charges those compani rendered to 93,272 subscribers located in thirty-five states and the District of Columbia.

31. Those central stations in the United States which were not controlled or operated by defendants were owned and operated by about 30 firms, only two of which owned and operated more than one central station each.

32. Grinnell was not itself in the accredited CSPS business. However, Grinnell manufactures the alarms, sprinklers, and other equipment which may be denominated the machinery of the business. It is the principal supplier of the dominant companies in the market. And its economic interest as a supplier stretches beyond the immediate purchasers, that is, beyond the other defendants, to the subscribers for CSPS because some of Grinnell's compensation for its equipment takes the form of a share in the revenues received by them from the fees paid to them by their subscribers.

33. Under allocation agreements, executed in 1907, Grinnell as late as 1960 received over $1,200,000 revenue produced by contracts made by its affiliates with one or more of the subscribers located in one or more of the thirty-five states and the District of Columbia.

34. The business of defendants comprehended the constant use of interstate commerce involving equipment, officers, salesmen, correspondence, even to an appreciable extent electric current carrying alarm signals from one state to another.

35. Documents were sent regularly from the principal or home offices of the three alarm company defendants (ADT, Holmes, and AFA) across state lines. Furthermore, reports, proposed contracts, payments, and other communications move

across state lines to the principal or home offices of the alarm defendants. Travel from one state to another on company business takes a substantial part of the working time of the principal officers of each of the defendants. This travel, as well as the written communications, produce a high degree of integration of the major policies of the three alarm company defendants, and resulted in effective control by Grinnell of all four defendants, their company subdivisions, their district sales offices, and their personnel.

36. Defendant Grinnell had approximately 42 automatic sprinkler system contracting offices in various parts of the United States. In negotiating for sales of automatic sprinkler systems, Grinnell's agents solicited also contracts for central station protection service by ADT. Grinnell and AFA supplied certain protection devices used in such service, and they received from ADT certain percentages of the revenues therefrom. Grinnell paid to its agents commissions on central station protection service contracts secured for ADT.

37. Substantial quantities of protection devices manufactured and assembled by ADT in the States of New York and Missouri, by AFA in the State of New York, and by Grinnell in various States of the United States, regularly were sold and shipped across state lines to subsidiaries, affiliates, sales offices, or central stations of defendants Grinnell, ADT, and AFA for installation in other states and in foreign countries. Substantial quantities or protection devices and materials produced by other manufacturers located in various states of the United States regularly were sold and shipped across state lines to defendants and to independent central station electric protection service companies located in states other than the state of manufacture.

38. In Washington, D.C., Kansas City, Missouri, St. Louis, Missouri, and in several other cities throughout the United States, central stations, including central stations of defendants, rendered protection service to subscribers across state lines. The protection devices installed on the premises of such subscribers located in one state were connected through leased telephone wires with central stations located in other states or in the District of Columbia.

39. The operations of defendants' subsidiaries, district sales offices, contracting offices, and central stations located in various states were directed, controlled and supervised by officers and agents of their respective principal offices located in different states. Those subsidiaries district sales offices and central stations utilized contract forms, price lists and instructions sent from their respective principal offices across state lines, and they, in turn, regularly sent to those principal offices reports, proposed contracts, payments, and other communications. Officers and other representatives of those principal offices constantly travelled across state lines to and from such subsidiaries, sales offices, contracting offices, and central stations throughout the United States. The activities of defendant ADT's subsidiaries were interrelated, interdependent, and integrated in all of the states of the United States in which they operated.

40. Thus, there existed in the central station electric protection service business a substantial regular flow across state lines of equipment, electrical signals, personnel, contracts, correspondence, communications, checks, and other media of credit and exchange. Defendants' business could not be continued but for that part of it which moved back and forth across state lines.

41. The business of supplying and installing protection devices on the premises of subscribers, maintaining such devices, and furnishing to subscribers protection from fire, burglary, or other hazards, through central stations accredited for such service by insurance inspecting and rating organizations is a trade or industry which constitutes part of the commerce among the several states subject to regulation by Congress under Article I, Sec. 8, cl. 3 of the United States Constitution, and regulated by Congress by virtue of the Sherman Act, and the accredited CSPS business which is performed by each of the three

alarm company defendants and was controlled by defendant Grinnell is, likewise, part of interstate commerce subject to Congressional regulation and regulated by the Sherman Act.

42. Since 1925, defendant ADT had acquired the capital stock or the assets of twenty-two central station protection companies in the United States.

43. During the period 1904-54, the alarm company defendants, before they were affiliated, entered into a series of agreements which provided for the allocation of geographic areas and classes of CSPS. The influence of those agreements in forming business patterns remains to a discernible extent.

44. Beginning in or about the year 1906, the defendants or their predecessor corporations have entered into various agreements defining areas of the United States in which they would engage in central station protection service; limiting the types of central station protection service which they would supply in certain areas; and providing for joint participation in the installation of certain types of central station protection systems and for dividing the revenues derived therefrom among themselves.

45. On September 28, 1906, prior to the affiliation of ADT and Holmes, those companies made a written agreement whereby ADT conveyed to Holmes all burglar alarm business, including subscriber contracts and installed devices, in New Jersey, Maryland, Delaware, the District of Columbia, eight counties of New York (New York, Richmond, Kings, Queens, Nassau,

Suffolk, Westchester, and Rockland), six counties in Pennsylvania (Philadelphia, Delaware, Chester, Montgomery, Bucks, and Allegheny), and so much of Connecticut as lies within 33 miles of New York City. In those areas ADT agreed forever to refrain from engaging in central station burglar alarm service. Holmes agreed forever to refrain from engaging in any type of protection service outside of those areas; and within those areas to limit itself to burglar alarm service, and, in the case of financial institutions, to nightwatch service. Most of the pattern thus established continued. As of December 31, 1961, Holmes did not render service outside of the defined area; nor within the area did it serve a single central station fire alarm subscriber.

46. In 1907 Grinnell entered into a series of agreements with the other defendant companies and with Automatic Fire Protection Co. (herein called "Automatic") to the following effect:

(A) AFA received the exclusive right to provide central station sprinkler supervisory and waterflow alarm and automatic fire alarm service in New York City, Boston and Philadelphia, and agreed not to provide burglar alarm service in those cities or central station service elsewhere in the United States.

(B) Automatic Fire Protection Co. obtained the exclusive right to provide central station sprinkler supervisory and waterflow alarm service everywhere else in the United States except for the three cities in which AFA received that exclusive right, and agreed not to engage in burglar alarm service.

(C) ADT received the exclusive right to render burglar alarm and nightwatch service throughout the United States. (Under ADT's 1906 agreement with Holmes, however, it could not provide burglar alarm services in the areas for which it had given Holmes the exclusive right to do so.) It agreed not to furnish sprinkler supervisory and waterflow alarm service anywhere in the country and not to furnish automatic fire alarm service in New York City, Boston or Philadelphia (the three cities allocated to AFA). ADT agreed to connect to its central stations the systems installed by AFA and Automatic.

(D) Grinnell agreed to furnish and install all sprinkler supervisory and waterflow alarm actuating devices used in systems that AFA and Automatic would install, and otherwise not to engage in the central station protection business.

(E) AFA and Automatic received 25 percent of the revenue produced by the sprinkler supervisory and waterflow alarm service which they provided in their respective territories; ADT and Grinnell received 50 percent and 25 percent, respectively, of the revenue which resulted from such service. The agreements were to continue until February 1954.

47. The 1907 agreements remained substantially unchanged until 1949 when ADT purchased all of Automatic Fire Protection Co.'s rights under it for $13,500,000. After these 1907 agreements expired in 1954, AFA continued to honor the prior division of territories; and ADT and AFA entered into a new contract providing for the continued sharing of revenues on substantially the same basis as before. In 1954 Grinnell and ADT renewed an agreement with a Rhode Island company which received the exclusive right to render central station service within Rhode Island at prices no lower than those of ADT and which agreed to use certain equipment supplied by Grinnell and ADT and to share its revenues with those companies. ADT had an informal agreement with a competing central station company in Washington, D.C., that the two would not solicit each other's accounts.

48. The alarm company defendants when, faced with competition, they, being in a dominant position, manipulated their own prices to forestall competition.

49. ADT over the years reduced its minimum basic rates to meet competition and renewed contracts at substantially increased rates in cities where it had a monopoly of accredited central station service. ADT threatened retaliation against firms that contemplated inaugurating central station service. In contemplating opening a new central station, ADT officials frequently stressed that such action would deter their competitors from opening a new station in that area.

50. Over the years ADT purchased the stock or assets of twenty-seven companies engaged in the business of providing burglar or fire alarm services. Holmes acquired the stock or assets of three burglar alarm companies in New York City using a central station. Of these thirty, the officials of seven agreed not to engage in the protection service business in the area for periods ranging from five years to permanently. After Grinnell acquired control of the other defendants, the latter continued in their attempts to acquire central station companies -- offers being made to at least eight companies between the years 1955 and 1961, including four of the five largest non-defendant companies in the business.

51. Grinnell long faced a problem of competing with ADT. That was one reason it acquired AFA and Holmes. Prior to settlement of a dispute and controversy with ADT, Grinnell prepared to go into the central station service business. By acquiring ADT in 1953, Grinnell eliminated that alternative. Its control of the three other defendants eliminated any

possibility of an outbreak of competition that might have occurred when the 1907 agreements terminated. By those acquisitions it perfected the monopoly power to exclude competitors and fix prices.

52. Grinnell's relations to ADT, AFA, and Holmes were in a formal sense so structured that each of the affiliates of Grinnell had separate officers, and separate boards of directors which have independent identity. But since 1919, and up to about 196[illegible] the balance sheets of Grinnell, submitted as part of Grinnell's reports to its stockholders, have shown, though in unconsolidated form, the results of the operations of all four defendants.

53. The president of Grinnell sat upon the board of directors of each of the four defendants, and was chairman of the board of ADT. There was only one fellow director of ADT who was not an officer of Grinnell or of ADT.

VII

VIOLATIONS ALLEGED AND EFFECTS

54. For many years past and continuing up to and including the date of the filing of this complaint, the defendants and co-conspirators have been engaged in an unlawful combination and conspiracy to restrain and in an unlawful combinatic and conspiracy to monopolize, and the defendants have attempted to monopolize and have monopolized, the aforesaid interstate trade and commerce in central station electric protection service, in violation of Sections 1 and 2 of the Sherman Act.

55. The aforesaid combinations and conspiracies to restrain and to monopolize have consisted of a continuing agreement and concert of action among the defendants and co-conspirators, the substantial terms of which have been:

(a) That competition among defendants would be restricte with respect to certain types of protection service and in certain areas;

(b) That sales of protection devices produced by defendants would be restricted;

(c) That defendants would acquire the stock or assets of persons and firms engaged in the business of central station protection service;

(d) That persons and firms whose stock or assets defendants acquired would be prohibited from continuing or resuming the business of central station protection service, for extended periods of time or forever, in all or in large parts of the United States.

56. Pursuant to and in effectuation of the aforesaid combinations and conspiracies, attempt to monopolize, and monopolization, the defendants, among other things:

(a) Did those things which, as hereinbefore alleged, they conspired and agreed to do;

(b) Threatened and persuaded actual and potential competitors not to enter or to discontinue the business of central station electric protection service;

(c) Initiated price wars to injure and destroy competitors in certain areas, and intentionally charged for their services to subscribers less in areas in which competitors operated than in areas in which central stations were operated by defendants only.

(d) Fixed, charged and maintained prices for their services to subscribers at higher and/or artificial levels than would have prevailed in the absence of such violations.

(e) Restrained, suppressed and eliminated competition for said services and denied purchasers of such services, including plaintiff, the benefits of free competition.

57. The aforesaid violations have had, among other things, the following effects:

(a) The commerce of central station electric protection service has been unreasonably restrained and monopolized;

(b) Actual and potential competitors of defendants have been excluded and prevented from rendering central station electric protection service;

(c) Competition among defendants has been curtailed and eliminated;

(d) Subscribers to central station electric protection service and purchasers of protection devices, including plaintiff, have been denied the benefits from a free and competitive market.

(c) Purchasers of such services, including plaintiff, have been compelled to pay higher prices for such services than they would have paid in the absence of such violations.

VIII

PRIOR PROCEEDINGS BY THE UNITED STATES OF AMERICA

58. The acts, practices and conduct of defendants alleged herein to be violations of the Sherman Act have been the subject of a Civil Action (No. 2785 - entitled United States of America v. Grinnell Corporation, et al.) instituted on April 13, 1961, by the United States of America in the District Court for the District of Rhode Island against the defendants named herein. In said action, the United States charged that said defendants and co-conspirators have engaged in an unlawful combination and conspiracy to restrain, an unlawful combination and conspiracy to monopolize, have attempted to monopolize, and have monopolized interstate trade and commerce in accredited central station protection service. Such allegations are similarly alleged in this complaint. On November 27, 1964, the District Court filed its findings of fact, conclusions of law and final judgment, 236 F. Supp. 244 (1964) which are incorporated herein by reference. It held that Grinnell, ADT, Holmes, and AFA, defendants herein, had violated Section 1 of the Sherman Act by combining and conspiring to restrain, and continuing to restrain, interstate trade and commerce in accredited central station protection service, and had violated Section 2 of the Sherman Act by attempting to monopolize and monopolizing interstate trade and commerce in accredited central station protection service. On June 13, 1966, the judgment of the District Court was affirmed by the United States Supreme Court 384 U.S. 563, and remanded for further

hearings on the nature of the relief consistent with the said opinion and decision of the United States Supreme Court. On July 11, 1967, the said United States District Court for the District of Rhode Island filed its final judgment, which, by its terms, became effective on November 1, 1967. No appeal has been taken therefrom. A copy of said judgment is attached hereto as Exhibit "A" to this complaint and incorporated herein.

59. By virtue of said proceedings of the United States of America, plaintiff asserts the suspension of any applicable state or period of limitations affecting its rights of action herein against defendants, as provided in Section 5(b) of the Clayton Act.

IX.

FRAUDULENT CONCEALMENT

60. Plaintiff had no knowledge of the aforesaid combinations and conspiracies, attempt to monopolize and monopolization, or of facts which might have led to the discovery thereof prior to the institution of the aforementioned civil proceedings. All of said antitrust violations had been fraudulently concealed by the defendants by various means and methods used to avoid the detectio thereof including, among others, misrepresentations as to, and concealment of, the true nature of the charges imposed by the defendants. By virtue of such fraudulent concealment plaintiff asserts the tolling of any applicable statute or period of limitations affecting its rights of action herein.

X.

INJURY TO PLAINTIFF

61. Since at least 1933, and prior thereto, and during the continuance of the aforesaid combinations and conspiracies, attempt to monopolize and monopolization and during the suspensio of the statute of limitations and the tolling thereof, as aforementioned, and to the present time, plaintiff has made

substantial purchases of the products and services hereinabove defined from one or more of the defendants herein.

62. By reason of defendants' combinations and conspiracies, attempt to monopolize, and monopolization, plaintiff, and the members of the class it represents, have been denied the benefits from a free and competitive market in accredited central station protection services and have been compelled to pay more for such services than it would have paid had defendants' combinations and conspiracies, attempt to monopolize and monopolization not existed. By operation of defendants' unlawful conduct, including but not limited to discriminatory pricing practices and the retention of title to protection systems installed on premises owned or occupied by plaintiff and members of the class it represents, plaintiff, and the members of the class it represents, were compelled to pay substantially higher prices than would have been the case but for defendants' violations. As a result thereof, plaintiff, and the members of the class it represents, have been injured and damaged by defendants in an amount which is presently undetermined. The full amount of the damages incurred by plaintiff as a result thereof is undetermined as information pertaining thereto is in the possession of and known to the defendants. It is the amount above the amount that would have been paid in the absence of the said combinations and conspiracies, attempt to monopolize and monopolization, together with such monetary damages and expenses which occurred as a result thereof.

WHEREFORE, plaintiff demands:

a. Judgment against defendants and in favor of plaintiff and each member of the class they represent for threefold the damages determined to have been sustained by each plaintiff respectively, together with the costs of suit, including a reasonable attorney's fee;

b. That defendants be enjoined from continuing the acts, conduct and conspiracy hereinbefore alleged;

c. Such other and further relief as may appear necessary and appropriate.

David Berger
Herbert B. Newberg
H. Laddie Montague, Jr.
Howard L. Schambelan
22nd Floor, P.S.F.S. Building
Philadelphia, Pennsylvania 19107
Special Counsel for Plaintiffs,
City of Philadelphia, and
City of Detroit.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
DEC 13 1971
S. D. OF N. Y.

CITY OF DETROIT, et al. : 68 CIV. 4026

v.

GRINNELL CORPORATION, et al. : (E.D.PA. CIV. 68-1478)

MANHATTAN-WARD, INC., et al. : 68 CIV. 4028

v.

GRINNELL CORPORATION, et al. : (E.D.PA. CIV. 68-1489)

1225 VINE STREET BUILDING, INC., et al. : 68 CIV. 4027

v.

GRINNELL CORPORATION, et al. : (E.D.PA. CIV. 68-1479)

SETTLEMENT ORDER NO. 1

The named plaintiffs in Civil Action Nos. 68 Civ. 4026, 68 Civ. 4027 and 68 Civ. 4028 (hereinafter "these actions") and defendants Grinnell Corporation ("Grinnell"), American District Telegraph Company ("ADT"), Holmes Electric Protective Company ("Holmes") and Automatic Fire Alarm Company ("AFA") (hereinafter referred to as "defendants") having entered into and filed an agreement dated August 27, 1971 settling and compromising the aforesaid actions as class actions as therein provided (hereinafter referred to as "Settlement Agreement" and annexed hereto as Exhibit A), subject to the approval of the Court and it appearing that the proposed Settlement Agreement may be a fair and reasonable one, now this 13th day of December, 1971, pursuant to Rules 23(c)(2), 23(d) and 23(e) of the Federal Rules of Civil Procedure, it is hereby ORDERED:

1. All discovery and other pretrial proceedings in these actions among plaintiffs and defendants, except only such proceedings as are specifically provided for in the Settlement Agreement and/or are, or shall be appropriate in connection with this Order, are stayed and suspended until further order of this Court.

2. For the purposes of settlement only and for no other purpose, the motion of plaintiffs to have these actions maintained as class actions is hereby GRANTED and it is ORDERED that the classes in the civil actions (hereinafter "these classes") shall be defined as follows:

(i) "All state, county and local governments and public bodies, and public schools and school districts" (hereinafter called "Governmental Class")

(ii) "All owners and/or operators of retail stores, shopping centers, office buildings, apartment houses, hotels and motels, theaters and other amusement buildings, and private institutions" (hereinafter called "Commercial Class")

(iii) "All owners and/or operators of industrial and commercial manufacturing plants" (hereinafter called "Industrial Class")

"situated throughout the United States which have purchased accredited central station protection services from one or more of the defendants in the period in suit and have suffered damages thereby as a result of the antitrust violations herein alleged."

3. Counsel of record for the Class Representatives shall appoint one, or more, of the attorneys for plaintiffs in these actions and counsel of record for the defendants shall appoint one, or more, of the attorneys for defendants in these actions, who together shall constitute a Committee to supervise and carry out the provisions of this Order in connection with providing notice to the members of these classes as provided herein. The defendants shall bear all the expenses and disbursements incurred by the Committee in connection with the giving of published and mailed notices (hereinafter described) as provided for in paragraph 4(b)(iii) of the Settlement Agreement; all other expenses will be paid out of the settlement fund.

4. Said Committee shall, with the cooperation of the Clerk of this Court, lease a numbered Post Office Box of adequate size, and all notices shall be mailed under the franking privileges of this Court, and shall bear the designation of said Post Office Box as the return address. All documents required herein to be filed with the Clerk of the Court shall be mailed to said Post Office Box.

5. The Committee shall arrange for the printing, publication and mailing of Notices of these class actions, including notice of the time and place of all further proceedings, as provided in this Order, in the form annexed hereto as Exhibit B. The last day for prospective members of the Class to file requests for exclusion shall be January 26, 1972 and the last day for members of the Class to file a "Sworn Statement of Claim" shall be February 10, 1972. As used herein, the term "file" shall include mailing in an envelope postmarked on or before the date specified for filing.

6. (a) The Notices shall be mailed on or before December 23, 1971 directly to either all actual accredited central station protection service ("a/s/c/p/s") customers of ADT, AFA and/or Holmes during the years 1957 through 1968, or to all a/c/s/p/s customers listed on such defendants' current customer lists, except those who were not a/c/s/p/s customers between April 13, 1957 and July 11, 1968, whichever is most practicable under the circumstances. Within three (3) days from the date of this Order, ADT, Holmes and AFA must file with the Court, with a copy to designated counsel for plaintiffs, an affidavit stating whether it has lists readily available or lists which can be readily compiled, of the names and addresses of their a/c/s/p/s customers for the years 1957 through 1968. Wherever such lists are readily available or can be readily compiled, such lists shall be used. In all other cases, each defendant's current a/c/s/p/s customer list, except those who were not a/c/s/p/s customers between April 13, 1957 and July 11, 1968 shall be used.

(b) [illegible] shall submit in writing to the Committee the appropriate list of customers referred to in paragraph 6(a) above within fourteen (14) days from the date of this Order. Such list shall be used by the Committee only in connection with this action and shall not be disclosed to anyone without a court order. The Court hereby determines that no other practicable means exists for the determination of and direct notification by mail of the persons who may be members of the class.

7. Notice shall be published in The New York Times and The Wall Street Journal (including all regional editions) once per week for three consecutive weeks, such notice to be approximately 1/8 of a page. The last publication shall be on or before December 27 30, 1971. The Court hereby determines that the foregoing notice, together with the notice provided for in paragraph 6 hereinabove, is the most practicable means of notice to these classes under the circumstances of these cases and that no other practicable means exists for the determination and notification of the persons who may be members of these classes.

JMM

8. The Committee shall keep accurate and complete records, and shall file with the Court, in camera, as soon as practicable, one or more affidavits of service setting forth the names and addresses of all class members to whom notices were sent and records of publication of notice as required hereinabove.

9. The Committee shall be responsible for the initial receipt of all responses to said Notices, and shall preserve for filing of record, upon subsequent Order of the Court, all written elections to be excluded from these classes, entries of appearance, sworn statements of claim and any and all other

written communications from class members or any other person in response to said Notices.

10. The Committee, upon receipt, shall make available information to all parties to these cases relative to the notice program and shall be responsible for answering in writing any written inquiries from class members and all other persons. Counsel for the Class Representatives shall file with the Committee a copy of all written inquiries to them from class members and all other persons and all written responses thereto and shall make and file a memorandum of each oral response to any inquiry which shall include the date of the inquiry and the response, if different, the substance of the inquiry and the response, the name and address of the person making the inquiry and, if different, the name and address of the person or entity on whose behalf the inquiry is made.

11. (a) Promptly upon receipt of each "Sworn Statement of Claim", the Committee shall undertake whatever investigation any member of the Committee deems reasonable or necessary to verify, to the extent possible, the accuracy and completeness of said "Sworn Statement of Claim" and, upon request, shall inform any Plaintiff or Defendant of the results of any such verification investigation of any "Sworn Statement of Claim". All challenges by any member of the Committee as to the timeliness, accuracy and/or completeness of any "Sworn Statement of Claim" and all challenges as to whether any claim, or any portion thereof is within any of the Classes shall be submitted in writing to the Court setting forth the grounds for

said challenge on or before March 2, 1972. If the Committee rejects all or any portion of any Sworn Statement of Claim, it will mail written notice to the claimant [illegible] of such rejection on or before March 2, 1972. Any claimant who wishes to contest the Committee's rejection must file in duplicate with the Clerk of the Court on or before March 16, 1972 a request to review the rejection together with any supporting papers.

(b) After each timely filed "Sworn Statement of Claim" has been verified to the extent deemed necessary by any member of the Committee and all challenged claims, if any, have been submitted to the Court, the Committee shall file with the Court, in camera, and serve on Counsel for the Class Representatives and Counsel for each Defendant on or before March 21, 1972, an affidavit setting forth the name, address and amount of the claim of each member of any of these Classes which has timely filed a "Sworn Statement of Claim", indicating whether or not a challenge has been made.

12. Counsel of record for the Class Representatives shall file with the Court, and serve on Counsel for each of the Defendants on or before March 21, 1972, a proposed plan of allocation together with an application for allowance of attorneys' fees and their actual out-of-pocket expenses incurred in connection with this action.

13. A hearing shall be held before this Court on April 27, 1972 at 10:30 A.M. in Courtroom 102, United States Courthouse, Foley Square, New York, New York for purposes of determining (a) whether the Settlement Agreement and plan of

allocation of the Settlement Fund among plaintiffs and participating class members shall be approved and these actions discontinued with prejudice; and (b) whether the application for attorneys' fees and other disbursements provided for in paragraph 12 of this Order shall be approved. Class members wishing to file objections must do so on or before April 13 6, 1972 by filing their objections in writing with the Clerk of this Court at the following address: John Livingston, Clerk, United States District Court, Southern District of New York, P.O. Box ,
Wall Street Station, New York, New York 10005.

U.S.D.J.

Dated: New York, New York
December , 1971

CAHILL, GORDON, SONNETT, REINDEL & OHL
EIGHTY PINE STREET
NEW YORK, N.Y. 10005
TELEPHONE 212-944-7400

HAROLD R. REINDEL
JOHN F. OHL
CHARLES F. DETMAR, JR.
LAWRENCE J. McKAY
F. ARNOLD DAUM
JERROLD G. VAN CISE
IRWIN SCHNEIDERMAN
DON B. STOOKEY
CLIFFORD L. PORTER
JOHN M. RICHARDSON
O. CARLYSLE McCANDLESS
DANIEL JAMES
OLIVER N. HAVENS
DUDLEY B. TENNEY
WILLIAM E. HEGARTY
DENIS McINERNEY
WILLIAM M. SAYRE
RAYMOND L. FALLS, JR.
IMMANUEL KOHN
RALPH O. WINGER

JEROME DOYLE
PAUL H. FOX
LOFTUS E. BECKER
WILLIAM T. LIFLAND
WALTER C. CLIFF
JOSEPH P. CONWAY
DAVID R. HYDE
RALPH C. MENAPACE, JR.
MARSHALL H. COX, JR.
THOMAS F. CURNIN
EDWARD A. HANSEN
H. RICHARD SCHUMACHER
JOHN R. YOUNG
WILLIAM E. DENNIS
MICHAEL F. ARMSTRONG
HENRY G. BISGAIER
CARL M. BORNMANN
R. ANTHONY ZEIGER
FLOYD ABRAMS

EDWARD HIDALGO
PARIS, FRANCE
DONALD J. MULVIHILL
WASHINGTON, D.C.

PAUL W. WILLIAMS
FREDRICK C. KEMPNER
COUNSEL
THURLOW M. GORDON
JAMES A. FOWLER, JR.
OF COUNSEL

WASHINGTON OFFICE
FEDERAL BAR BUILDING WEST
1819 H STREET, N.W.
WASHINGTON, D.C. 20006

EUROPEAN OFFICE
4, PLACE DE LA CONCORDE
PARIS, FRANCE

RADIO AND CABLE ADDRESSES
"COTTOFRANK NEWYORK"
"COTTOFRANK WASHINGTON"
"COTTOFRANK PARIS"

August 27, 1971

David Berger, Esq.
1622 Locust Street
Philadelphia, Pennsylvania 19103

Re: City of Detroit, et al v. Grinnell Corporation, et al., Civil Action No. 68 Civ. 4026 and related Civil Action Nos. 68 Civ. 4027, 4028 and 4029 (S.D.N.Y.)

Dear Mr. Berger:

You, as agent and counsel for each and every named plaintiff in Civil Action Nos. 68 Civ. 4026, 4027, 4028 and 4029 presently pending in the United States District Court for the Southern District of New York, as well as counsel who has filed such actions in behalf of alleged classes, and we, as agents and counsel for Grinnell Corporation ("Grinnell"), American District Telegraph Company ("ADT"), Holmes Electric Protective Company ("Holmes") and Automatic Fire Alarm Company ("AFA") (collectively "defendants") hereby represent and agree:*

---

* You have advised us and we acknowledge that this Agreement does not purport to settle the claims asserted in Civil Action Nos. 68-4637, 68-4638 or 68-4639 (S.D.N.Y.).

1. You hereby represent that you are authorized as counsel and, where necessary, as agent, to take all steps on behalf of your respective clients which this Agreement contemplates. In like fashion, we represent that we are authorized by defendants as their counsel and as their agents for purposes of this Agreement, to take all steps on behalf of defendants which this Agreement contemplates.

2. The intent and purpose of this Agreement is to enable defendants to effect full and final settlement of these actions, including the class actions. It is understood that this Agreement is made on behalf of the classes set forth in Civil Action Nos. 68-4026, 4027 and 4028 (S.D.N.Y.).

3. Defendants agree, solely for the purposes of this settlement and its implementation, that Civil Action Nos. 68-4026, 4027 and 4028 (S.D.N.Y.) shall proceed as class actions as alleged in the respective complaints, but if such settlement fails to be approved or otherwise fails of consummation, then defendants retain all rights to object to the maintenance of the actions as class actions.

4. You and we will forthwith jointly move for and take all necessary steps in appropriate sequence as follows:

(a) Request the Court to preliminarily approve this Settlement Agreement.

(b) Request the Court to order that notice be directed to class members as defined in the complaints in these actions, advising them that they will be bound by the judgment in this action unless, within 30 days after the last date of the publication of notice, they file a written election to be excluded from the class, and providing further that each member of the classes who did not file a written election to be excluded will be required to file, within 45 days after the last date of publication of notice, a sworn statement of claim based on advance or installation charges and service charges paid annually for each calendar year during the period April 13, 1957 through July 11, 1968 or be forever barred from recovery in these actions. The parties believe, and will so represent to the Court, that the best notice practicable under the circumstances of these cases is as follows:

(i) Direct notice by mail to either the actual accredited central station protection service ("a/c/s/p/s") customers of ADT, AFA and Holmes during the years 1957 through 1968, or to all a/c/s/p/s customers listed on their current customer lists, except those who were not a/c/s/p/s customers prior to July 11, 1968, at the option of each of said companies.

(ii) Notice by publication in The New York Times and The Wall Street Journal (including all regional editions), such notice to be approximately 1/8 of a page, and published once a week for three consecutive weeks.

(iii) Except to the extent the Court orders the use of franking privileges, we agree to bear all costs incurred in connection with the aforedescribed notice program.

(c) Thereafter, and within 90 days after the last date of publication of the notice, promptly move the Court for approval of this settlement and request the Court to order: (i) that notices regarding the hearing on the proposed settlement, the allocation thereof, and the award of costs and attorneys' fees be promptly sent out to each member of the respective classes who has filed a sworn statement of claim; (ii) that those wishing to file objections must do so within 14 days after mailing of said notice; and (iii) that the hearing on any such objections be set for between 7 and 14 days after the final date for their receipt.

(d) Following final approval by the Court of the settlement, jointly file a motion for a final judgment declaring Civil Action Nos. 68 Civ. 4026, 4027 and 4028 as proper class actions and dismissing all claims in these actions with prejudice as to all party defendants pursuant to Rule 23, F.R. Civ. P.

5(a). In settlement of the claims in these actions, including all costs (except those described in paragraph 4(b)(iii) above), attorneys' fees and disbursements, we agree to pay to you or your order, as agent and counsel, certain sums as hereinafter set forth, which sums total Ten Million Dollars ($10,000,000.00) (hereinafter "Settlement Fund"). Defendants further agree to pay to you, as agent for plaintiffs and members of the various classes, interest from the date of entry of the final judgment until the date of payment of the Settlement Fund or any portion thereof, and thereafter on the remaining unpaid portion of the Settlement Fund, said interest to be at the prime rate prevailing from time to time during said period at The Chase Manhattan Bank, New York City, New York, plus one point. Said interest shall be payable by each of the defendants upon its share of the outstanding balance of the Settlement Fund at the time the various portions of the Settlement Fund become payable, except as set forth in paragraph (b)(iv) below.

(b) We agree to pay the Settlement Fund as follows:

(i) Grinnell Corporation will pay $3,850,000 plus interest as hereinbefore provided, as follows:

(A) $1,283,334 plus all accrued interest upon entry of final judgments dismissing defendant Grinnell Corporation with prejudice as a party defendant from these actions, and the expiration or exhaustion of any rights of appeal therefrom;

(B) $1,283,333, plus all accrued interest, on January 15, 1973, or 90 days after the first payment provided in (A) above is due, whichever date is later; and

(C) $1,283,333, plus all accrued interest, on January 15, 1974, or 90 days after the second payment provided in (B) above is due, whichever date is later.

(ii) ADT will pay $4,850,000 plus interest as hereinbefore provided, as follows:

(A) $1,616,667, upon entry of final judgments dismissing defendant ADT with prejudice as a party defendant from these actions, and the expiration or exhaustion of any rights of appeal therefrom;

(B) $1,616,666, plus all accrued interest on January 15, 1973, or 90 days after the first payment provided in (A) above is due, whichever date is later; and

(C) $1,616,666, plus all accrued interest, on January 15, 1974, or 90 days after the second payment provided in (B) above is due, whichever date is later.

(iii) Holmes will pay $900,000 plus interest as hereinbefore provided, as follows:

(A) $225,000 plus all accrued interest on January 15, 1975; and

(B) $675,000 plus all accrued interest on January 15, 1976.

(iv) AFA will pay $400,000 plus interest as hereinbefore provided, as follows:

(A) $100,000 on January 15, 1975; and

(B) $300,000 together with all interest which has hitherto accrued, on January 15, 1976.

(c) Upon entry of final judgments dismissing with prejudice the defendants from these actions and the expiration or exhaustion of any rights of appeal therefrom, each defendant will deliver to you a judgment note substantially in the form attached hereto as Exhibit "A" for each deferred payment as set forth in subparagraph (b) immediately above.

(d) Any defendant may, at its option, elect to prepay its share or any part thereof of the Settlement Fund without penalty but with accrued interest at any time prior to the times of payment set forth in subsection (b) immediately above.

6. Defendants do not admit that they have engaged in any illegal or wrongful activity or that any person has sustained any damage by reason of any of the facts complained of in the foregoing civil actions.

7. If and when necessary, we both agree to deliver to each other such papers as may be necessary to give full effect to the terms and intent of this Agreement.

8. Nothing contained herein shall be deemed to be an approval or adoption by you or any plaintiff of the manner in which the defendants arrived at the amount to be paid hereunder, or as an approval or adoption by defendants of the formula, if any, used by you and/or plaintiffs in arriving at the amount to be paid hereunder or the manner of distributing such amount. You shall have the sole responsibility, subject to that Court approval specified in paragraph 4(c) hereof, with respect to the distribution of the amount paid to you and defendants shall have no responsibility or obligation with respect thereto.

9. You and we hereby stipulate, subject to approval of the Court, to the stay of all matters pending in any of these actions except those matters necessary to conclude the settlement of these actions. This paragraph is effective immediately and is not dependent upon the execution of any formal stipulations.

If the foregoing sets forth the Agreement you have reached with us and we with you, will you please sign in the space provided below and return four fully executed copies of this letter Agreement to us promptly.

Sincerely,

Cahill, Gordon, Sonnett, Reindel & Ohl

By: ______________________
Attorneys for Defendant Grinnell
Corporation

White and Case

By: ______________________
Attorneys for Defendant
American District Telegraph Company

Kelley Drye Warren Clark Carr & Ellis

By: ______________________
Attorneys for Defendant
Holmes Electric Protective Company

Olwine, Connelly, Chase, O'Donnell
& Weyher

By: ______________________
Attorneys for Defendant
Automatic Fire Alarm Company

AGREED TO AND ACCEPTED:

____
David Berger, Attorney
As Agent and Counsel for
Plaintiffs

COGNOVIT NOTE*

August , 1971

For value received, on or before 1972, promises to pay to the order of David Berger, Attorney, the sum of This note shall bear interest on the unpaid principal amount thereof from the date hereof until paid at a rate per annum which shall be 1% in excess of the prime commercial loan rate of The Chase Manhattan Bank, New York City, New York, for 90 day maturities, which rate per annum shall change when and as said prime commercial loan rate shall change.

The maker hereby authorizes any Attorney at Law to appear for it in an action on the above note at any time after said note becomes due, in any Court of Record situated in the County where this warrant was signed, or where the maker then resides, to waive the issuing and service of process, and confess a judgment in favor of the legal holder of this note against the maker for the amount that may then be due thereon, with interest at the rate herein mentioned, and costs of suit, and to waive and release all errors in said proceeding and the right of appeal from the judgment rendered.

ATTEST:

By ______________________

President

____

Secretary

Signed at
this day of 1971.

---

* For notes for later years the following paragraph should be added:

The maker has this day delivered a companion cognovit note in the sum of payable on or before . In the event of a default in such note, then the instant note due on or before shall be deemed in like default.

PUBLISHED NOTICE

OFFICE OF THE CLERK UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
P. O. BOX NO.
NEW YORK, NEW YORK

LEGAL NOTICE

WITH RESPECT TO CLAIMS IN CONNECTION WITH PURCHASES OF ACCREDITED CENTRAL STATION PROTECTION SERVICES

NOTICE IS HEREBY GIVEN that there is now pending in the United States District Court for the Southern District of New York civil actions for treble damages for alleged violations of the antitrust laws with respect to the sale of services by accredited central station protection companies. Three of these actions have been brought as class actions as described below. The defendants, while denying the alleged violations and liability on account thereof, have agreed to settle the claims of plaintiffs in these three actions and the members of the classes which they represent. For this purpose only, defendants have agreed that these three actions may be maintained as class actions.

You may be a member of one of these classes of plaintiffs in these three actions whose rights may be affected by this litigation. This notice is not to be misunderstood as an expression of any opinion by this Court as to the merits of any of the claims or defenses asserted by either side in this litigation, or as to any amount that any claimant would receive, but is published for the sole purpose of informing you of the pendency of this litigation and the settlement so that you may decide what steps you may wish to take in relation to these lawsuits.

The complaints filed in these various class actions seek recovery of treble damages, together with reimbursement of costs and an award of attorneys' fees, on behalf of the named plaintiffs and the members of the classes whom they represent, for alleged overcharges resulting from an alleged antitrust conspiracy and monopolization among defendants with respect to the sale of accredited central station protection services. The following are the named defendants: GRINNELL CORPORATION ("GRINNELL"), AMERICAN DISTRICT TELEGRAPH COMPANY ("ADT"), HOLMES ELECTRIC PROTECTIVE COMPANY ("HOLMES") and AUTOMATIC FIRE ALARM COMPANY ("AFA"). The claims are based on purchases of accredited central station protection services from the named defendants or their various subsidiaries or divisions.

The classes of plaintiffs on whose behalf these actions have been brought are as follows:

(i) All state, county and local governments and public bodies and public schools and school districts (hereinafter called "governmental class")

(ii) All owners and/or operators of retail stores, shopping centers, office buildings, apartment houses, hotels and motels, theaters and other amusement buildings, and private institutions (hereinafter called "commercial class")

(iii) All owners and/or operators of industrial and commercial manufacturing plants (hereinafter called "industrial class") situated through the United States, which have purchased accredited central station protection services from one or more of the defendants in the period in suit and have suffered damages thereby as a result of the antitrust violations alleged above.

The plaintiffs in these class actions are (i) Governmental Class: CITY OF PHILADELPHIA and CITY OF DETROIT, (ii) Commercial Class: 1225 VINE STREET BUILDING, INC.; BAZAAR OF ALL NATIONS; and GREAT SCOTT MARKETS, INC., (iii) Industrial Class: MANHATTAN-WARD, INC.; GLOBE GEAR COMPANY; DREXEL DYNAMICS CORPORATION; CROWN PAPER BOARD COMPANY, INC.; and BELMONT IRON WORKS.

Counsel for representative plaintiffs is David Berger, Esquire, 1622 Locust Street, Philadelphia, Pennsylvania 19103.

In final settlement of all present and prospective claims of all plaintiffs and class members who do not exclude themselves from these classes, defendants have agreed to pay the sum of ten million dollars ($10,000,000.00) (hereinafter the "Settlement Fund"), to be paid over a period of approximately five years in unequal installments. Each of the defendants has agreed to pay the following: Grinnell: $3,850,000; ADT: $4,850,000; Holmes: $900,000; and AFA: $400,000.

All delayed payments to the Settlement Fund to be made by defendants shall accrue interest after entry of final judgment at the prime rate prevailing from time to time during that period at The Chase Manhattan Bank, N.Y.C., N.Y., plus one point.

The Settlement Fund shall be divided among persons entitled thereto in proportion to the purchases by each plaintiff and each participating class member of accredited central station protection services from ADT, Holmes and/or AFA or any of their subsidiaries or divisions during the period April 13, 1957 through July 11, 1968.

All attorneys' fees and costs allowed by the Court incurred in connection with this litigation and this settlement shall be deducted from the Settlement Fund, except that defendants have agreed to bear all costs incurred in connection with the giving of notice.

FURTHER NOTICE IS HEREBY GIVEN

1. If you purchased central station protection services from ADT, Holmes or AFA during the period April 13, 1957 through July 11, 1968, you will be deemed to be a party to the class action you are a member of, and will be included in, and bound by, the judgment in these actions and any determination affecting the class whether favorable or not, unless you file with the Clerk of the Court as provided in paragraph 3 a written election to be excluded from these classes of plaintiffs on or before [date: within thirty days after the last date of publication of notice].

2. If you are a member of a class who does not elect to be excluded and you wish to receive a share of the Settlement Fund, you must file with the Clerk, a

written "Sworn Statement of Claims" not later than [date: within forty-five days after the last date of publication of notice] in the form which has been approved by the Court, or you will be forever barred from recovery for any claim you may have which is the subject matter of this litigation. A copy of such Form of "Sworn Statement of Claim" can be obtained on written request from the Clerk of this Court at the address set forth in ¶ 3 below.

3. Your election to be excluded from the class, or your Sworn Statement of Claims, and all other documents to be filed of record in this case, should be addressed to: John Livingston, Clerk, United States District Court, Southern District of New York, P. O. Box No ________, Wall Street Station, New York, New York 10005.

4. If you do not elect to be excluded from the classes of plaintiffs, you may, but need not, enter an appearance through counsel of your choice if you desire, and you have all the rights set forth in Rule 23 of the Federal Rules of Civil Procedure. If you do not request exclusion or enter an appearance you will be represented by David Berger, Esquire, 1622 Locust Street, Philadelphia, Pennsylvania 19103.

5. If you are a member of any of the classes defined herein who does not elect timely to be excluded and who does not file a Sworn Statement of Claims or or before [date], you shall not receive notice of any further proceedings, hearings, orders or any other matters in connection with your claims, including the entry of final judgment dismissing with prejudice any claim you may have

BEST COPY AVAILABLE

which is the subject matter of this litigation against the defendants and you shall be bound by all said proceedings, hearings, orders and other matters. In the event you exclude yourself from participation in the settlement, you should be advised that any similar suit hereafter instituted by you may be barred by the applicable statutes of limitations.

6. If you have any questions concerning the matters dealt with in this Notice which you want to raise, please address your questions to the Class Committee, P. O. Box No. ,Wall Street Station, New York, New York 10005.

The Settlement Agreement, the pleadings and other proceedings in these actions (identified as Civil Actions Nos. 68 Civ. 4026, 4027 and 4028) may be examined and copied at any time during regular office hours at the offices of the Clerk of this Court.

JOHN LIVINGSTON, Clerk
United States District Court
Southern District of New York
P.O. Box Wall Street Station
New York, N. Y. 10005

DATED: October , 1971
New York, New York

SWORN STATEMENT OF CLAIM

The undersigned has read and is familiar with the contents of the Notice which accompanied this Statement of Claim, and reference is made to the Notice for the matters described and the terms-defined therein.

The undersigned is within a Class defined in the Notice, has not filed a written election to be excluded therefrom, and thus, upon the filing of this Statement, may be entitled to receive a share of the Settlement Fund in accordance with the terms set forth in the Notice.

The "Schedule" on the back hereof sets forth all of the relevant purchases made by the undersigned during the period April 13, 1957 through June 11, 1968, subject to whatever verification may be required.

The documents relied upon to support your claim should be maintained and available for inspection if requested.

The undersigned represents that the statements made herein and the figures set forth herein are true.

____
Name of Claimant

By: ________________________
Name and Title

Sworn to before me this
day of 1971.

____
Address

____
Notary Public

(seal)

Exhibit I

EXHIBIT I -- STATEMENT OF CLAIM

e of Claimant: ____________________

ress of Claimant: ____________________

____

State Zip

CLAIMANT'S PURCHASES OF ACCREDITED CENTRAL STATION PROTECTION SERVICES FOR THE PERIOD APRIL 13, 1957 THROUGH JULY 11, 1968

1 remises rotected	2 Ident of Defendant Furnishing Service	3 Type of Service Received*	4 Date of Contract	5 (a) Duration of Contract	5 (b) Period of Actual Service	6 Dollar Amount of Contract (a) Advance Service Charge Installation	6 Dollar Amount of Contract (b) Total Annual Service Charges Paid	6 Dollar Amount of Contract (c) Total Paid (a+b)
							TOTAL:	

*for example, fire alarm, burglar alarm, sprinkler supervisory and waterflow alarm and industrial process supervision

MAILED NOTICE

OFFICE OF THE CLERK UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
P. O. BOX NO.
NEW YORK, NEW YORK

LEGAL NOTICE

WITH RESPECT TO CLAIMS IN CONNECTION WITH PURCHASES OF ACCREDITED CENTRAL STATION PROTECTION SERVICES

Pursuant to Rules 23(c)(2) and 23(d) of the Federal Rules of Civil Procedure, YOU ARE HEREBY NOTIFIED:

There is now pending in this Court civil actions for treble damages for alleged violations of the antitrust laws with respect to the sale of services by accredited central station protection companies. Three of these actions have been brought as class actions as described below. The defendants, while denying the alleged violations and liability on account thereof, have agreed to settle the claims of plaintiffs in these three actions and the members of the classes which they represent. For this purpose only, defendants have agreed that these three actions may be maintained as class actions.

This notice is being sent to you in the belief that you are or may be a member of one of these classes of plaintiffs whose rights may be affected by this litigation. This notice is not to be misunderstood as an expression of any opinion by this Court as to the merits of any of the claims or defenses asserted by either side in this litigation, or as to any amount that any claimant would receive but is sent for the sole purpose of informing you of the pendency of this litigation and the settlement so that you may make decisions as to what steps you may wish to take in relation to these lawsuits.

The complaints filed in these various class actions seek recovery of treble damages, together with reimbursement of costs and an award of attorneys' fees, on behalf of the named plaintiffs and the members of the classes whom they represent, for alleged overcharges resulting from an alleged antitrust conspiracy and monopolization among defendants with respect to the sale of accredited central station protection services. The following are the named defendants: GRINNELL CORPORATION ("GRINNELL"), AMERICAN DISTRICT TELEGRAPH COMPANY ("ADT"), HOLMES ELECTRIC PROTECTIVE COMPANY ("HOLMES") and AUTOMATIC FIRE ALARM COMPANY ("AFA"). The claims are based on purchases of accredited central station protection services from the named defendants or their various subsidiaries or divisions.

The classes of plaintiffs on whose behalf these actions have been brought are as follows:

(i) All state, county and local governments and public bodies and public schools and school districts (hereinafter called "governmental class")

(ii) All owners and/or operators of retail stores, shopping centers, office buildings, apartment houses,hotel and motels, theaters and other amusement buildings, and private institutions (hereinafter called "commercial class")

(iii) All owners and/or operators of industrial and commercial manufacturing plants (hereinafter called "industrial class")

situated throughout the United States which have purchased accredited central station protection services from one or more of the defendants in the period in suit and have suffered damages thereby as a result of the antitrust violations alleged above.

The plaintiffs in these class actions are: (i) Governmental Class: CITY OF PHILADELPHIA and CITY OF DETROIT, (ii) Commercial Class: 1225 VINE STREET BUILDING, INC.; BAZAAR OF ALL NATIONS; and GREAT SCOTT MARKETS, INC., (iii) Industrial Class: MANHATTAN-WARD, INC.; GLOBE GEAR COMPANY; DREXEL DYNAMICS CORPORATION; CROWN PAPER BOARD COMPANY, INC.; and BELMONT IRON WORKS.

Counsel for representative plaintiffs is David Berger, Esquire, 1622 Locust Street, Philadelphia, Pennsylvania 19103.

In final settlement of all present and prospective claims of all plaintiffs and class members who do not exclude themselves from these classes, defendants have agreed to pay the sum of ten million dollars ($10,000,000.00) [hereinafter the "Settlement Fund"], to be paid over a period of approximately five years in unequal installments. Each of the defendants has agreed to pay the following: Grinnell: $3,850,000; ADT: $4,850,000; Holmes: $900,000; and AFA: $400,000.

All delayed payments to the Settlement Fund to be made by defendants shall accrue interest after entry of final judgment at the prime rate prevailing from time to time during that period at The Chase Manhattan Bank, N.Y.C., N.Y., plus one point.

The Settlement Fund shall be divided among persons entitled thereto in proportion to the purchase by each plaintiff and each participating class member of accredited central station protection services from ADT, Holmes and/or AFA or any of their subsidiaries or divisions during the period April 13, 1957 through July 11, 1968.

All attorneys' fees and costs allowed by the court incurred in connection with this litigation and this settlement shall be deducted from the Settlement Fund, except that defendants have agreed to bear all costs incurred in connection with the giving of notice.

FURTHER NOTICE IS HEREBY GIVEN

1. If you purchased central station protection services from ADT, Holmes or AFA during the period April 13, 1957 through July 11, 1968, you will be deemed to be a party to the class action you are a member of, and will be included in, and bound by, the judgment in these actions and any determination affecting the class whether favorable or not, unless you file with the Clerk of the Court as provided in paragraph 3 a written election to be excluded from these classes of plaintiffs on or before [date: within thirty days after the last date of publication of notice].

All delayed payments to the Settlement Fund to be made by defendants shall accrue interest after entry of final judgment at the prime rate prevailing from time to time during that period at The Chase Manhattan Bank, N.Y.C., N.Y., plus one point.

The Settlement Fund shall be divided among persons entitled thereto in proportion to the purchases by each plaintiff and each participating class member of accredited central station protection services from ADT, Holmes and/or AFA or any of their subsidiaries or divisions during the period April 13, 1957 through July 11, 1968.

All attorneys' fees and costs allowed by the court incurred in connection with this litigation and this settlement shall be deducted from the Settlement Fund, except that defendants have agreed to bear all costs incurred in connection with the giving of notice.

FURTHER NOTICE IS HEREBY GIVEN

1. If you purchased central station protection services from ADT, Holmes or AFA during the period April 13, 1957 through July 11, 1968, you will be deemed to be a party to the class action you are a member of, and will be included in, and bound by, the judgment in these actions and any determination affecting the class whether favorable or not, unless you file with the Clerk of the Court as provided in paragraph 3 a written election to be excluded [illegible] plaintiffs [illegible] [date; within thirty days after the last date of publication of notice].

2. If you are a member of a class who does not elect to be excluded and you wish to receive a share of the Settlement Fund, you must file with the Clerk a written "Sworn Statement of Claims" not later than [date: within forty-five days after the last date of publication notice], or you will be forever barred from recovery for any claim you may have which is the subject matter of this litigation. Such statement shall be in the form attached hereto as Exhibit I.

3. Your election to be excluded from the class, or your Sworn Statement of Claims, and all other documents to be filed of record in this case, should be addressed to: John Livingston, Clerk, United States District Court, Southern District of New York, P. O. Box. No. ________, Wall Street Station, New York, New York 10005.

4. If you do not elect to be excluded from the classes of plaintiffs, you may, but need not, enter an appearance through counsel of your choice if you desire, and you have all the rights set forth in Rule 23 of the Federal Rules of Civil Procedure. If you do not request exclusion or enter an appearance you will be represented by David Berger, Esquire, 1622 Locust Street, Philadelphia, Pennsylvania 19103.

5. If you are a member of any of the classes defined herein who does not elect timely to be excluded and who does not file a Sworn Statement of Claims on or before [date], you shall not receive notice of any further proceedings, hearings, orders or any other matters in connection with your claims, including the entry of final

judgment dismissing with prejudice any claim you may have which is the subject matter of this litigation against the defendants and you shall be bound by all said proceedings, hearings, orders and other matters. In the event you exclude yourself from participation in the settlement, you should be advised that any similar suit hereafter instituted by you may be barred by the applicable statutes of limitations.

6. If you have any questions concerning the matters dealt with in this Notice which you want to raise, please address your questions to the Class Committee, P. O. Box No. , Wall Street Station, New York, New York 10005.

The Settlement Agreement, the pleadings and other proceedings in these actions (identified as Civil Actions Nos. 68 Civ. 4026, 4027 and 4028) may be examined and copied at any time during regular office hours at the offices of the Clerk of this Court.

JOHN LIVINGSTON, Clerk
United States District Court
Southern District of New York
P. O. Box , Wall Street Station
New York, New York 10005

DATED: October , 1971
New York, New York

LEGAL NOTICE

WITH RESPECT TO CLAIMS IN CONNECTION WITH PURCHASES OF ACCREDITED CENTRAL STATION PROTECTION SERVICES

Pursuant to Rules 23(c)(2) and 23(d) of the Federal Rules of Civil Procedure, YOU ARE HEREBY NOTIFIED:

There is now pending in this Court civil actions for treble damages for alleged violations of the anti-trust laws with respect to the sale of services by accredited central station protection companies. Three of these actions have been brought as class actions as described below. The defendants, while denying the alleged violations and liability on account thereof, have agreed to settle the claims of plaintiffs in these three actions and the members of the classes which they represent. For this purpose only, defendants have agreed that these three actions may be maintained as class actions.

This notice is being sent to you in the belief that you are or may be a member of one of these classes of plaintiffs whose rights may be affected by this litigation. This notice is not to be misunderstood as an expression of any opinion by this Court as to the merits of any of the claims or defenses asserted by either side in this litigation, or as to any amount that any claimant would receive, but is sent for the sole purpose of informing you of the pendency of this litigation and the settlement so that you may make decisions as to what steps you may wish to take in relation to these lawsuits.

The complaints filed in these various class actions seek recovery of treble damages, together with reimbursement of costs and an award of attorneys' fees, on behalf of the named plaintiffs and the members of the classes whom they represent, for alleged overcharges resulting from an alleged anti-trust conspiracy and monopolization among defendants with respect to the sale of accredited central station protection services. The following are the named defendants: Grinnell Corporation ("Grinnell"), American District Telegraph Company ("ADT"), Holmes Electric Protective Company ("Holmes") and Automatic Fire Alarm Company ("AFA"). The claims are based on purchases of accredited central station protection services from the named defendants or their various subsidiaries or divisions.

The classes of plaintiffs on whose behalf these actions have been brought are as follows:

(i) All state, county and local governments and public bodies and public schools and school districts (hereinafter called "governmental class");

(ii) All owners and/or operators of retail stores, shopping centers, office buildings, apartment houses, hotels and motels, theaters and other amusement buildings, and private institutions (hereinafter called "commercial class");

(iii) All owners and/or operators of industrial and commercial manufacturing plants (hereinafter called "industrial class");

situated throughout the United States which have purchased accredited central station protection services from one or more of the defendants in the period in suit and have suffered damages thereby as a result of the antitrust violations alleged above.

The plaintiffs in these class actions are: (i) Governmental Class: City of Philadelphia and City of Detroit, (ii) Commercial Class: 1225 Vine Street Building, Inc.; Bazaar of All Nations; and Great Scott Markets, Inc., (iii) Industrial Class: Manhattan-Ward, Inc.; Globe Gear Company; Drexel Dynamics Corporation; Crown Paper Board Company, Inc.; and Belmont Iron Works.

In final settlement of all present and prospective claims of all plaintiffs and class members who do not exclude themselves from these classes, defendants have agreed to pay the sum of ten million dollars ($10,000,000.00) [hereinafter the "Settlement Fund"], to be paid over a period of approximately five years in the following installments: $2,900,000 upon entry of final judgment; $2,900,000 plus interest on January 15, 1973; $2,900,000 plus interest on January 15, 1974; $325,000 plus interest on January 15, 1975; and $975,000 plus interest on January 15, 1976. All delayed payments to the Settlement Fund to be made by defendants shall accrue interest after entry of final judgment at the prime rate prevailing from time to time during that period at The Chase Manhattan Bank, N. Y., N. Y., plus one point.

Plaintiffs and defendants have applied to the Court for the approval of the proposed settlement. In the event the Court approves the settlement as fair and adequate, David Berger, Esq. and the law firm of David Berger, P.A., attorneys for the plaintiffs-class representatives in these actions, with offices at 1622 Locust Street, Philadelphia, Pennsylvania, will make application for reimbursement of out-of-pocket litigation expenses to date of approximately $5,000 and for fees in an amount equal to twenty-five percent of the gross settlement recovery. The proposed settlement is payable to participating class members on an installment basis over a five year period. Plaintiffs' counsel will defer payment of counsel fees so that such fees will also be paid in installments of twenty-five percent of each corresponding gross installment sum actually collected and available for distribution over this five year period.

After payment out of the Settlement Fund of plaintiffs' litigation expenses together with reasonable attorneys' fees in such amounts as the Court may determine on application, and of any Special Master's fees and estimated expenses likewise to be determined by the Court, if any, the Settlement Fund shall be divided among persons entitled thereto in proportion to the purchases by each plaintiff and each participating class member of accredited central station protection services from ADT, Holmes and/or AFA or any of their subsidiaries or divisions during the period April 13, 1957 through July 11, 1968.

FURTHER NOTICE IS HEREBY GIVEN

1. If you purchased central station protection services from ADT, Holmes or AFA during the period *April 13, 1957 through July 11, 1968*, you will be deemed to be a party to the class action you are a member of, and will be included in, and bound by, the judgment in these actions and any determination affecting the class whether favorable or not, unless you mail to the Clerk of the Court as provided in paragraph 3 a written election to be excluded from these classes of plaintiffs on or before January 26, 1972.

2. If you are a member of a class who does not elect to be excluded and you wish to receive a share of the Settlement Fund, you must mail to the Clerk a written "Sworn Statement of Claim" not later than February 10, 1972, or you will be forever barred from recovery for any claim you may have which is the subject matter of this litigation. Such statement shall be in the form attached hereto as Exhibit I.

3. Your election to be excluded from the class, or your Sworn Statement of Claim, and all other documents to be filed of record in this case, should be addressed to: *John Livingston, Clerk, United States District Court, Southern District of New York, P. O. Box No. 1000, Wall Street Station, New York, New York 10005.* The postmark on any envelope will determine whether the mailing has been timely.

4. If you do not elect to be excluded from the classes of plaintiffs, you may, but need not, enter an appearance through counsel of your choice if you desire, and you have all the rights set forth in Rule 23 of the Federal Rules of Civil Procedure. If you do not request exclusion or enter an appearance you will be represented by David Berger, Esq.

5. If you are a member of any of the classes defined herein who does not elect timely to be excluded and who does not mail to the Clerk of the Court a Sworn Statement of Claims on or before February 10, 1972, you shall not receive notice of any further proceedings, hearings, orders or any other matters in connection with your claims, including the entry of final judgment dismissing with prejudice

any claim you may have which is the subject matter of this litigation against the defendants and you shall be bound by all said proceedings, hearings, orders and other matters. In the event you exclude yourself from participation in the settlement, you are advised that any similar claim hereafter made by you may be barred in whole or in part by the applicable statutes of limitations.

6. By order dated December 13, 1971, the Court has directed that a hearing be held on April 27, 1972 at 10:30 A.M. in Room 1105 of the United States Courthouse, Foley Square, New York, New York 10007. Under such order, any member of the class who has not requested exclusion and has timely filed a Sworn Statement of Claim may appear at such hearing in person or by counsel and may show cause, if any he has, why the Settlement Agreement should not be approved as fair, reasonable and adequate, why fees and allowances should not be granted and why judgments thereon should not be entered, and may present any evidence that may be proper and relevant to the issues to be heard; provided, however, that no such person shall be heard and no papers or briefs submitted by any person shall be received and considered, except as the Court may in its discretion direct, unless, on or before April 13, 1972 notice of intention to appear together with such papers and briefs are mailed to the Clerk of the Court at the address set forth above and copies thereof are served upon David Berger, Esq., 1622 Locust Street, Philadelphia, Pennsylvania 19103 and Cahill, Gordon, Sonnett, Reindel & Ohl, 80 Pine Street, New York, New York 10005.

7. If you have any questions concerning the matters dealt with in this Notice which you want to raise, please address your questions to the Clerk of the Court at the address set forth in paragraph 3 above.

The Settlement Agreement, the pleadings and other proceedings in these actions (identified as Civil Actions Nos. 68 Civ. 4026, 4027 and 4028), including the proposed Plan of Allocation of the settlement amount to be filed March 21, 1972, may be examined and copied at any time during regular office hours at the offices of the Clerk of this Court.

CHARLES M. METZNER
United States District Judge

DATED: December 13, 1971
New York, New York

EXHIBIT I

SWORN STATEMENT OF CLAIM

The undersigned has read and is familiar with the contents of the Notice which accompanied this Statement of Claim, and reference is made to the Notice for the matters described and the terms-defined therein.

The undersigned is within a Class defined in the Notice, has not filed a written election to be excluded therefrom, and thus, upon the filing of this Statement, may be entitled to receive a share of the Settlement Fund in accordance with the terms set forth in the Notice.

The "Schedule" on the back hereon sets forth all of the relevant purchases made by the undersigned during the period April 13, 1957 through June 11, 1968, subject to whatever verification may be required.

The documents relied upon to support your claim should be maintained and available for inspection if requested.

The undersigned represents that the statements made herein and the figures set forth herein are true.

____
Name of Claimant

By:________________________________
Name of Title

____
Address

Sworn to before me this
day of , 1972.

____
Notary Public

(SEAL)

Name of Claimant: ____________________

Address of Claimant: ____________________

____

City State Zip

CLAIMANT'S PURCHASES OF ACCREDITED CENTRAL STATION PROTECTION SERVICES FOR THE PERIOD APRIL 13, 1957 THROUGH JULY 11, 1968

1	2	3	4	5		6		
						Dollar Amount of Contract		
Premises Protected	Identity of Defendant Furnishing Service	Type of Service Received*	Date of Contract	(a) Duration of Contract	(b) Period of Actual Service	(a) Advance Service Charge Installation	(b) Total Annual Service Charges Paid	(c) Total Paid (a+b)
							Total:	

* For example, fire alarm, burglar alarm, sprinkler supervisory and waterflow alarm and industrial process supervision.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Orig. filed -
4/4/72

- - - - - - - - - - - - - - - - - - -x
CITY OF DETROIT, et al. :
68 Civ. 4026
v. :
(E.D. Pa. Civ. 68-1478)
GRINNELL CORPORATION, et al. :
- - - - - - - - - - - - - - - - - - -x
MANHATTAN-WARD, INC., et al. :
68 Civ. 4028
v. :
(E.D. Pa. Civ. 68-1489)
GRINNELL CORPORATION, et al. :
- - - - - - - - - - - - - - - - - - -x
1225 VINE STREET BUILDING, INC., :
et al.
: 68 Civ. 4027
v.
: (E.D. Pa. Civ. 68-1479)
GRINNELL CORPORATION, et al.
:
- - - - - - - - - - - - - - - - - - -x

SETTLEMENT ORDER NO.2

NOW, upon reading and filing the affidavit of H. Laddie Montague, Jr., counsel for the Class Representatives and a member of the Class Action Committee, sworn to on March 29, 1972, it is hereby

ORDERED, that:

(1) Paragraphs 11(b) and 12 of Settlement Order No.1, dated December 13, 1971, are amended to the extent that the time within which the Class Action Committee is to file an affidavit setting forth the name, address and amount of the claim of each member of any of the classes and indicating whether or not a challenge has been made, and the time within which the counsel for the Class Representatives shall file

a proposed plan of allocation together with an application for allowances of attorneys fees and costs, is adjourned from March 21, 1972 to April 21, 1972.

(2) Paragraph 13 of Settlement Order No.1 is amended to provide that the hearing on the approval of the settlement agreement, plan of allocation and the application for attorneys' fees and disbursements, scheduled for April 27, 1972 at 10:30 A.M. in Court Room 1105 of the United States Court House, Foley Square, New York, New York, is adjourned until ~~Thursday~~ Wednesday, May 24, 1972 in Room ~~1105~~ 35 at 4:30 P.M.

CMM

(3) Paragraph 13 of Settlement Order # 1 is further amended to provide that the time within which class members wishing to file objections to the adequacy of the settlement, the plan of allocation and/or the application for counsel fees and other disbursements, is adjourned from April 16, 1972 to May 12, 1972.

(4) Class members who have filed objections and wish to be heard at the hearing on May 24, 1972 shall mail notice of intention to be heard by May 12, 1972.

(5) The Class Committee shall give notice of the date changes set forth in this Order to each claimant who has filed a sworn statement of claim and to each attorney who has filed a notice of appearance. Such notice shall be in the form set forth below and shall be posted on or before April 7, 1972:

" NOTICE

Re: Accredited Central Station Protective
Services Litigation, 68 Civ. 4026, 4027
and 4028 (S.D.N.Y.)

PLEASE TAKE NOTICE that by Order of
, 1972 the Court has granted the

following extensions of time:

(a) To April 21, 1972: Class Action Committee to file list of claimants and amount of claims;

(b) To April 21, 1972: Counsel for Class Representatives to file proposed Plan of Allocation and Petition for Award of Costs and Attorneys' fees;

(c) May 12, 1972: Any objections to proposed Settlement, Plan of Allocation and Petition for Award of Costs and Attorneys' Fees, together with a Notice of Intention to be heard at hearing, must be mailed;

(d) May 24, 1972: Hearing to determine approval of proposed settlement, Plan of Allocation, application for Attorneys' Fees and Costs to be held at 4:30 P.M. in Room ~~1105~~ 35 of the United States Court House, Foley Square, New York, New York 10007.

CLASS ACTION COMMITTEE"

(5) All other provisions of Settlement Order # 1 shall remain in full force and effect.

Charles M. Metzner
U.S.D.J.

Dated: New York, New York
April 3 , 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al : 68 Civ. 4026
v. :
GRINNELL CORPORATION, et al : (E.D. Pa. Civ. 68-1478)

MANHATTAN-WARD, INC., et al : 68 Civ. 4028
v. :
GRINNELL CORPORATION, et al : (E.D. Pa. Civ. 68-1489)

1225 VINE STREET BUILDING
INC., et al : 68 Civ. 4027
v. :
GRINNELL CORPORATION, et al : (E.D. Pa. Civ. 68-1479)

PLAN OF ALLOCATION OF SETTLEMENT FUND

Counsel for class representatives in the above-captioned actions submit this Plan of Allocation of the Settlement Fund among those class members who have timely submitted acceptable "Sworn Statements of Claim" in response to the Legal Notice heretofore given in these cases. The [illegible] of Allocation is based upon the Settlement Agreement of August 27, 1971, which creates a principal settlement fund of $10,000,000.00, to be paid in five unequal installments as follows:

Date of Payment	Amount	Interest
1. At time of final Judgment	$2,900,000	None[*]
2. January 15, 1973	2,900,000	Prime rate plus one point[**]
3. January 15, 1974	2,900,000	Prime rate plus one point[**]
4. January 15, 1975	325,000	Prime rate plus one point[**]
5. January 15, 1976	975,000	Prime rate plus one point[**]

Defendants have reserved the right to pre-pay without penalty any or all of the installments of the Settlement Fund but with interest which has accrued to the date of payment.

I.

INTRODUCTION

1. Pursuant to the Settlement Agreement and Order of the Court, and in compliance with Rule 23, Fed. R. Civ. P., the best practicable notice under the circumstances was given in these cases. Notice was mailed directly to all current subscribers of the three alarm company defendants[***] (totaling 89,816 subscribers). A true and correct copy of the mailed Notice is annexed hereto as Appendix "A". Further Notice was given by publication, on 1/8th page, in all regional editions

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[*] Interest on this amount may be earned during the time elapsing between date of payment by defendants and date of distribution.

[**] Prime rate as it exists from time to time at the Chase Manhattan Bank, New York City, New York.

[***] American District Telegraph Co.("ADT"), Holmes Electric Protective Co., ("Holmes"), and Automatic Fire Alarm Co., ("AFA").

of The New York Times and The Wall Street Journal on December 17, 23 and 30, 1971.

2. The Legal Notice not only apprised potential class members of the existence of these class actions but also of the proposed settlement and its terms. Class members who wished to be excluded from the classes were given until January 26, 1972, to mail written "Requests for Exclusion." Class members who desired to participate in the Settlement were given until February 10, 1972, to mail "Sworn Statements of Claim." The Notice expressly declared that in all cases of filing, "The postmark on any envelop will determine whether the mailing has been timely." [Emphasis added]

3. In response to the Notice, 14,079 claims were filed, some being postmarked after February 10, 1972.[*]

4. Each claim purported to set forth the dollar amount of the transactions with the three alarm company defendants for equipment installed or for services rendered during the period April 13, 1957 through July 11, 1968 with respect to accredited central station protective services.

5. The total transactions (in dollars) set forth in all claims (including those which were filed untimely or were otherwise challenged) is $329,598,877.81.[*] Of this

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[*] This amount does not include certain claims which were received during the weeks of April 10 and April 17, 1972, which claims have not yet been fully processed and accordingly were not included in the computer print-out filed with the Court on April 21, 1972.

total, $37,300,362.12 of claims have been challenged for one or more of the following reasons:

a. claim filed or postmarked after February 10, 1972;

b. claim not notarized;

c. claimant does not appear to be a member of any class;

d. name of particular defendant (ADT, Holmes and/or AFA) furnishing service not stated;

e. claim does not involve accredited central station protective services;

f. purchases from Grinnell Corporation not includable;

g. claim not specific enough to be reviewed properly;

h. entire claim outside the period April 31, 1957 through July 11, 1968;

i. a portion of your claim is outside the time period April 13, 1957, through July 11, 1968;

j. other.

6. Where challenges were made, claimants were given an opportunity to correct the challenged portion of the claim, if that was possible. A copy of the form of challenge letter containing instructions for correction of claims is annexed hereto as Appendix "B".

7. The Class Action Committee considered the issue of whether the following categories of claimants were includable as members of the "Commercial" or "Industrial" class: (1) banks and savings and loan associations; (2) religious and eleemosynary institutions; (3) private schools; (4) nonprofit

hospitals; (5) labor unions, fraternal and other nonprofit organizations; (6) persons engaged in professions (such as doctors, lawyers, dentists, architects, engineers, and accountants); (7) real estate or insurance brokers or agents; (8) stock or commodities brokers or traders; (9) wholesalers, and (10) warehousers. The Class Action Committee agreed to place a liberal construction upon the class definitions and accordingly did not challenge any of these categories of claimants as not being within one of the class definitions. However, the Committee took the position that private residences were not a part of any class.

8. Except for a miniscule number, all claims include within their listed transactions payment of an 8% Excise Tax. As payment of this tax is not properly includable in the claims, the total claims listed should be reduced by 8% in order to reflect pure transactions. With this done, the total unchallenged claims would equal $268,914,634.43 and the total of all claims would equal $303,230,967.59. See ¶16 infra.

II.

PLAN OF ALLOCATION

9. Counsel for the Class Representatives propose that the Settlement Fund be allocated among those class members who have timely submitted acceptable "Sworn Statements of Claim", the allocation to be made on a pro rata basis reflected in the following formula:

$$\text{Each claimant's gross recovery} = \frac{\text{his individual claim(\$)}}{\text{total claims acceptable(\$)}} \times \$10{,}000{,}000 \text{ (plus interes}$$

Under this formula, all claimants will recover the same percentage of their total transactions for equipment installed and services rendered with respect to accredited central station protection from the three defendant alarm companies during the 11-1/4 year relevant time period. The "net" recovery will equal the gross recovery less counsel fees and costs, as awarded by this Court.

10. This formula has been accepted and used in allocating and distributing settlement proceeds in many antitrust class actions, including the following: *City of Philadelphia v. Morton Salt Company*, Civil Action No. 33781 (E.D. Pa.); *City of Philadelphia v. Interpace Corporation*, Civil Action No. 43008 (E.D. Pa.); *City of Philadelphia v. General Host Corp.*, Civil Action No. 68-704 (E.D. Pa.); *School District of Philadelphia v. Harper and Row Publishers, Inc.*, Civil Action No. 68C2144 (N.D. Ill.); *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation*, Civil Action No. 41773 (E.D. Pa.); *Philadelphia Electric Co. v. Anaconda American Brass Company*, Civil Action No. 41734 (E.D. Pa.).

In the afore-cited cases, this or a similar formula was used even though there may have been present in those cases elements of local competition or local market peculiarities which ultimately could be shown to cause more or less damage to certain members of the class.

11. Counsel for class representatives recognize that in the cases sub judice, there are differences in price levels depending upon the city in which the particular claimant received service.[*] Accordingly, Counsel considered whether each claimant's recovery should be weighted in some manner to reflect the particular price level or competitive situation in the city in which it received service. The practical difficulty in making a weighted allocation of this type would outweigh its limited beneficial effect to a portion of the class. Moreover, to do so accurately would require additional costly and time consuming procedures.

12. Such factors as set forth in paragraph 11, supra, may be worthy of consideration in the proof of damages at trial. However, in the context of a settlement distribution, their infusion adds uncertainty and complexity, requires additional proof and would thus defeat the efficiencies and economies which a settlement bestows upon the Court and the parties. Consideration of these factors would require many more hearings and substantially more documentary evidence and the costs incidental thereto would substantially reduce the value of the Settlement Fund.

13. The economies of time and expense inherent in the across-the-board, "equal treatment of all" type of allocation as proposed herein inures to the benefit of all class

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[*] The complexity of this factor is magnified because many claimants receive service at many locations in many cities. In these cases, each location would have to be treated as a separate claimant for purposes of allocation.

members who share in the Settlement Fund.

III.

THE PERCENTAGE OF THE TRANSACTIONS RECOVERED

14. In determining the percentage of recovery upon which this allocation is based, two alternative basic sets of total transaction figures are being used:

a. total unchallenged transactions which equal approximately $292,298,515.69 (hereinafter "unchallenged transactions").

b. total transactions, challenged and unchallenged, which equal approximately $329,598,877.81) (hereinafter "total transactions").

Moreover, two alternative sums will be used as representing the total settlement recovery:

a. the principal Settlement Fund plus anticipated earned interest[*] ($695,452) plus costs of Notice paid by defendants ($37,895) or a total gross settlement recovery of $10,733,347 (hereinafter "estimated total Settlement Fund").

b. the principal Settlement Fund: $10,000,000 (hereinafter "principal Settlement Fund").

15. Using the figures set forth in ¶14 herein, each claimant will receive the percentage indicated below of his acceptable transactions, less counsel fees and reimbursement

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[*] For purposes of this preliminary allocation, it is assumed that the prime rate at the Chase Manhattan Bank in New York City will average 5% during the period of the settlement payments--until January 15, 1976. Thus, installment payments are calculated to earn interest at the rate of 6% (prime rate plus one point).

of costs as may be awarded by the Court, for accredited central station protective services furnished by the alarm company defendants during the period April 13, 1957 through July 11, 1968:

a. using "unchallenged transactions" ($292,298,515.69 and the "estimated total Settlement Fund ($10,733,347), this settlement represents a gross rate of return of 3.67%;

b. using "unchallenged transactions" ($292,298,515.69) and the "principal Settlement Fund" ($10,000,000), this settlement represents a gross rate of return of 3.42%;

c. using "total transactions" ($329,598,877.81) and the "total estimated Settlement Fund ($10,733,347), this settlement represents a gross rate of return of 3.26%;

d. using "total transactions" ($329,598,877.81) and the "principal Settlement Fund" ($10,000,000), this Settlement represents a gross rate of return of 3.03%.

Accordingly, the range of recovery for transactions covering an 11-1/4 year period is approximately 3.03% to 3.67%, depending upon the resolution of challenges to $37,300,362.12 of transactions. (For the usual four year settlement period in antitrust cases, this would be a range from 8.52% to 10.32%.).

16. It must also be kept in mind that almost all of the transactions listed include within their total dollar figure an 8% Federal Excise Tax. (See ¶8, supra). A deduction of this tax from the gross claim filed would reduce "unchallenged transactions" from $292,298,515.69 to $268,914,634.43, and "total transactions" from $329,598,877.81 to $303,230,967.59. Using these revised figures with the Excise Tax deducted, the

percentage recovered of acceptable transactions, prior to deduction of counsel fees and reimbursement of costs as awarded by the Court, will be:

a. Using "unchallenged transactions" ($268,914,634.43 and the "estimated total Settlement Fund" ($10,733,347), this settlement represents a gross rate of return of 3.99%;

b. Using "unchallenged transactions" ($268,914,634.43 and the "principal Settlement Fund" ($10,000,000), this settlement represents a gross rate of return of 3.72%;

c. Using "total transactions" ($303,230,967.59 and the "estimated total Settlement Fund" ($10,733,347), this settlement represents a gross rate of return of 3.54%;

d. Using "total transactions" ($303,230,967.59 and the "principal Settlement Fund" ($10,000,000), this settlement represents a gross rate of return of 3.30%.

Accordingly, the range of gross recovery for transactions exclusive of Excise Tax covering an 11-1/4 year period is approximately 3.30% to 3.99%. (For the usual four year Settlement period, this would be a range from 9.28% to 11.22%.).

17. The foregoing percentages are merely ranges in which it is anticipated the final settlement recovery rate of return will fall. Before any certainty of a final percentage can be ascertained, all outstanding challenges which have not yet been agreed to by the claimants must and will be resolved.

David Berger
H. Laddie Montague, Jr.
David Berger, P.A., Attorneys At Law
1622 Locust Street
Philadelphia, Pennsylvania 19103

Counsel for Representative Plaintiffs

LEGAL NOTICE

WITH RESPECT TO CLAIMS IN CONNECTION WITH PURCHASES OF ACCREDITED CENTRAL STATION PROTECTION SERVICES

Pursuant to Rules 23(c)(2) and 23(d) of the Federal Rules of Civil Procedure, YOU ARE HEREBY NOTIFIED:

There is now pending in this Court civil actions for treble damages for alleged violations of the anti-trust laws with respect to the sale of services by accredited central station protection companies. Three of these actions have been brought as class actions as described below. The defendants, while denying the alleged violations and liability on account thereof, have agreed to settle the claims of plaintiffs in these three actions and the members of the classes which they represent. For this purpose only, defendants have agreed that these three actions may be maintained as class actions.

This notice is being sent to you in the belief that you are or may be a member of one of these classes of plaintiffs whose rights may be affected by this litigation. This notice is not to be misunderstood as an expression of any opinion by this Court as to the merits of any of the claims or defenses asserted by either side in this litigation, or as to any amount that any claimant would receive, but is sent for the sole purpose of informing you of the pendency of this litigation and the settlement so that you may make decisions as to what steps you may wish to take in relation to these lawsuits.

The complaints filed in these various class actions seek recovery of treble damages, together with reimbursement of costs and an award of attorneys' fees, on behalf of the named plaintiffs and the members of the classes whom they represent, for alleged overcharges resulting from an alleged anti-trust conspiracy and monopolization among defendants with respect to the sale of accredited central station protection services. The following are the named defendants: GRINNELL CORPORATION ("Grinnell"), AMERICAN DISTRICT TELEGRAPH COMPANY ("ADT"), HOLMES ELECTRIC PROTECTIVE COMPANY ("Holmes") and AUTOMATIC FIRE ALARM COMPANY ("AFA"). The claims are based on purchases of accredited central station protection services from the named defendants or their various subsidiaries or divisions.

The classes of plaintiffs on whose behalf these actions have been brought are as follows:

(i) All state, county and local governments and public bodies and public schools and school districts (hereinafter called "governmental class");

(ii) All owners and/or operators of retail stores, shopping centers, office buildings, apartment houses, hotels and motels, theaters and other amusement buildings, and private institutions (hereinafter called "commercial class");

(iii) All owners and/or operators of industrial and commercial manufacturing plants (hereinafter called "industrial class");

situated throughout the United States which have purchased accredited central station protection services from one or more of the defendants in the period in suit and have suffered damages thereby as a result of the antitrust violations alleged above.

The plaintiffs in these class actions are: (i) Governmental Class: CITY OF PHILADELPHIA and CITY OF DETROIT, (ii) Commercial Class: 1225 VINE STREET BUILDING, INC.; BAZAAR OF ALL NATIONS; and GREAT SCOTT MARKETS, INC., (iii) Industrial Class: MANHATTAN-WARD, INC.; GLOBE GEAR COMPANY; DREXEL DYNAMICS CORPORATION; CROWN PAPER BOARD COMPANY, INC.; and BELMONT IRON WORKS.

In final settlement of all present and prospective claims of all plaintiffs and class members who do not exclude themselves from these classes, defendants have agreed to pay the sum of ten million dollars ($10,000,000.00) [hereinafter the "Settlement Fund"], to be paid over a period of approximately five years in the following installments: $2,900,000 upon entry of final judgment; $2,900,000 plus interest on January 15, 1973; $2,900,000 plus interest on January 15, 1974; $325,000 plus interest on January 15, 1975; and $975,000 plus interest on January 15, 1976. All delayed payments to the Settlement Fund to be made by defendants shall accrue interest after entry of final judgment at the prime rate prevailing from time to time during that period at The Chase Manhattan Bank, N. Y., N. Y., plus one point.

Plaintiffs and defendants have applied to the Court for the approval of the proposed settlement. In the event the Court approves the settlement as fair and adequate, David Berger, Esq. and the law firm of David Berger, P.A., attorneys for the plaintiffs-class representatives in these actions, with offices at 1622 Locust Street, Philadelphia, Pennsylvania, will make application for reimbursement of out-of-pocket litigation expenses to date of approximately $5,000 and for fees in an amount equal to twenty-five percent of the gross settlement recovery. The proposed settlement is payable to participating class members on an installment basis over a five year period. Plaintiffs' counsel will defer payment of counsel fees so that such fees will also be paid in installments of twenty-five percent of each corresponding gross installment sum actually collected and available for distribution over this five year period.

After payment out of the Settlement Fund of plaintiffs' litigation expenses together with reasonable attorneys' fees in such amounts as the Court may determine on application, and of any Special Master's fees and estimated expenses likewise to be determined by the Court, if any, the Settlement Fund shall be divided among persons entitled thereto in proportion to the purchases by each plaintiff and each participating class member of accredited central station protection services from ADT, Holmes and/or AFA or any of their subsidiaries or divisions during the period April 13, 1957 through July 11, 1968.

FURTHER NOTICE IS HEREBY GIVEN

1. If you purchased central station protection services from ADT, Holmes or AFA during the period *April 13, 1957 through July 11, 1968,* you will be deemed to be a party to the class action you are a member of, and will be included in, and bound by, the judgment in these actions and any determination affecting the class whether favorable or not, unless you mail to the Clerk of the Court as provided in paragraph 3 a written election to be excluded from these classes of plaintiffs on or before January 26, 1972.

2. If you are a member of a class who does not elect to be excluded and you wish to receive a share of the Settlement Fund, you must mail to the Clerk a written "Sworn Statement of Claim" not later than February 10, 1972, or you will be forever barred from recovery for any claim you may have which is the subject matter of this litigation. Such statement shall be in the form attached hereto as Exhibit I.

3. Your election to be excluded from the class, or your Sworn Statement of Claim, and all other documents to be filed of record in this case, should be addressed to: *John Livingston, Clerk, United States District Court, Southern District of New York, P. O. Box No. 1000, Wall Street Station, New York, New York 10005.* The postmark on any envelope will determine whether the mailing has been timely.

4. If you do not elect to be excluded from the classes of plaintiffs, you may, but need not, enter an appearance through counsel of your choice if you desire, and you have all the rights set forth in Rule 23 of the Federal Rules of Civil Procedure. If you do not request exclusion or enter an appearance you will be represented by David Berger, Esq.

5. If you are a member of any of the classes defined herein who does not elect timely to be excluded and who does not mail to the Clerk of the Court a Sworn Statement of Claims on or before February 10, 1972, you shall not receive notice of any further proceedings, hearings, orders or any other matters in connection with your claims, including the entry of final judgment dismissing with prejudice

any claim you may have which is the subject matter of this litigation against the defendants and you shall be bound by all said proceedings, hearings, orders and other matters. In the event you exclude yourself from participation in the settlement, you are advised that any similar claim hereafter made by you may be barred in whole or in part by the applicable statutes of limitations.

6. By order dated December 13, 1971, the Court has directed that a hearing be held on April 27, 1972 at 10:30 A.M. in Room 1105 of the United States Courthouse, Foley Square, New York, New York 10007. Under such order, any member of the class who has not requested exclusion and has timely filed a Sworn Statement of Claim may appear at such hearing in person or by counsel and may show cause, if any he has, why the Settlement Agreement should not be approved as fair, reasonable and adequate, why fees and allowances should not be granted and why judgments thereon should not be entered, and may present any evidence that may be proper and relevant to the issues to be heard; provided, however, that no such person shall be heard and no papers or briefs submitted by any person shall be received and considered except as the Court may in its discretion direct, unless, on or before April 13, 1972 notice of intention to appear together with such papers and briefs are mailed to the Clerk of the Court at the address set forth above and copies thereof are served upon David Berger, Esq., 1622 Locust Street, Philadelphia, Pennsylvania 19103 and Cahill, Gordon, Sonnett, Reindel & Ohl, 80 Pine Street, New York, New York 10005.

7. If you have any questions concerning the matters dealt with in this Notice which you want to raise, please address your questions to the Clerk of the Court at the address set forth in paragraph 3 above.

The Settlement Agreement, the pleadings and other proceedings in these actions (identified as Civil Actions Nos. 68 Civ. 4026, 4027 and 4028), including the proposed Plan of Allocation of the settlement amount to be filed March 21, 1972, may be examined and copied at any time during regular office hours at the offices of the Clerk of this Court.

CHARLES M. METZNER
United States District Judge

DATED: December 13, 1971
New York, New York

CHALLENGE TO CLAIM
BY
CLASS ACTION COMMITTEE

Re: Accredited Central Station Protective Services Litigation
Claim of ____

Claim # ______________ (You must refer to this claim number in any response.)

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AMOUNT OF CLAIM CHALLENGED:

$______________

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Dear Sir:

Pursuant to paragraph 11 of Settlement Order No. 1 (dated December 13, 1971), the Class Action Committee has reviewed your Sworn Statement of Claim and has challenged it as invalid for the reason or reasons indicated by the checked boxes immediately, below:

a. ☐ claim filed or postmarked after February 10, 1972;

b. ☐ claim not notarized;

c. ☐ claimant does not appear to be a member of any class; ______________________ claims are not included within any class definition;

d. ☐ name of particular defendant (ADT, Holmes and/or AFA) furnishing service not stated -- Column 2;

e. ☐ claim does not involve accredited central station protective services;

f. ☐ purchases from Grinnell Corporation not includable;

g. ☐ claim not specific enough to be reviewed properly;

h. ☐ entire claim outside the period April 13, 1957, through July 11, 1968;

i. ☐ a portion of your claim is outside the time period April 13, 1957, through July 11, 1968;
transactions listed: ______________________
less transactions outside time period: ______________
total transactions inside time period: ______________

j. ☐ other.

If you believe that you can correct the deficiencies of your claim, or if you do not agree with the Challenge by the Committee, you may file with the Clerk, P.O. Box 1000, Wall Street Station, New York, New York, 10005, on or before March 16, 1972, a corrected Sworn Statement of Claim or, if you wish to rely upon your original claim, you may file with the Clerk a written Request for Review of this challenge to your claim. In the event a corrected Claim is filed, but does not, in the opinion of the Committee, satisfy its challenge, you will be so notified and the filing of the corrected Claim shall be construed to be a Request for Review.

If you do not timely file a corrected Claim or a written Request for Review, the challenge will be deemed valid and binding against you and your claim will be rejected to the full extent of the challenge.

Once again, we remind you that any corrected Sworn Statement of Claim must be sworn to before a Notary Public and the corrected Claim or written Request for Review must be mailed to the Clerk on or before March 16, 1972. Any response must refer to your claim number as shown on this Challenge to Claim.

Sincerely,

CLASS ACTION COMMITTEE

By

Any response must be mailed to:

Clerk
P.O. Box 1000
Wall Street Station
New York, New York 10005

UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

CITY OF DETROIT, et al.	66 CIV. 4026
v.	
GRINNELL CORPORATION, et al.	(E.D. Pa. Civ. 68-1478)

MANHATTAN-WARD, INC., et al.	68 CIV. 4028
v.	
GRINNELL CORPORATION, et al.	(E.D. Pa. Civ. 68-1489)

1225 VINE STREET BUILDING, INC., et al.	68 CIV. 4027
v.	
GRINNELL CORPORATION, et al.	(E.D. Pa. Civ. 68-1479)

PETITION OF COUNSEL FOR THE CLASS REPRESENTATIVES FOR AWARD OF COUNSEL FEES AND COSTS

Petitioners are David Berger, Esquire and David Berger P.A., Attorneys at Law, 1622 Locust Street, Philadelphia, Pennsylvania, 19103 [hereinafter collectively "Petitioner"]. Petitioner is counsel for the class representatives in each of the three above-captioned class actions and respectfully submits this Petition for reimbursement of out-of-pocket costs actually incurred and to be incurred and for an award of attorneys' fees in the amount equal to twenty-five percent (25%) of the gross settlement recovery, without interest, such fee to be paid in installments of twenty-five percent (25%) of each corresponding gross settlement sum (exclusive of interest) actually collected and actually distributed in each of these class action cases.

As grounds for this Petition, Petitioner relies on all the proceedings heretofore had in these causes, the affidavit of David Berger, Esquire, and the affidavits of Honorable Ralph Lyncy, Jr., City Solicitor for the City of Pittsburgh, Pennsylvania, and of A.R. Seitell, President of Drexel Dynamics Corporation, a representative plaintiff in Civil Action No. 68 Civ. 4028, together with a Memorandum of Law submitted concurrently herewith.

David Berger
David Berger, P.A.,
Attorneys At Law
1622 Locust Street
Philadelphia, PA 19103

To: Cahill, Gordon, Sonnett,
Reindel & Ohl
80 Pine Street
New York, New York 10005

White & Case
14 Wall Street
New York, New York 10005

Kelley, Drye, Warren, Clark,
Carr, & Ellis
350 Park Avenue
New York, New York 10022

Olwine, Connelly, Chase,
O'Donnell & Weyher
299 Park Avenue
New York, New York 10017

UNITED STATES DISTRICT COURT
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CITY OF DETROIT, et al.	68 CIV. 4026
v.	
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v.	
GRINNELL CORPORATION, et al.	(E.D. Pa. Civ. 68-1479)

AFFIDAVIT

David Berger, Esquire, being duly sworn, deposes and says:

1. I am a member of the bar of the Supreme Court of Pennsylvania, the United States District Court for the Eastern District of Pennsylvania and the Supreme Court of the United States. I and my firm, David Berger, P.A., Attorneys At Law, 1622 Locust Street, Philadelphia, Pennsylvania, 19103 (hereinafter collectively "Petitioner") are counsel for each of the class representative plaintiffs in

the three above-captioned cases. I submit this affidavit in support of a Petition for an award of a twenty-five percent (25%) counsel fee plus reimbursement for out-of-pocket costs actually incurred and to be incurred in the continuing administration of these cases.

2. In this affidavit, I shall set forth the history of the litigation and its prosecution, the terms of the settlement and the petitioner's request for attorneys' fees and reimbursement of costs.

I.

HISTORY OF THE LITIGATION AND ITS PROSECUTION:

A. Commencement and the Nature of the Litigation.

3. The three above-captioned actions were commenced on July 10 and 11, 1968 in the Eastern District of Pennsylvania as national class actions on behalf of (generally defined) all state, county and municipal governmental entities, all commercial entities and all industrial entities.

4. Each complaint alleges a violation by the defendants of Sections 1 and 2 of the Sherman Act, charging the defendants with an unlawful combination and conspiracy to restrain trade and monopolize on a nationwide basis the "accredited central station protective services" industry. Pursuant to the aforesaid conspiracy, defendants are alleged

to have adopted a course of action calculated, inter alia, (1) to drive competitor companies out of business through predatory pricing, (2) to acquire competitor companies, and (3) where possible, to fix and maintain their prices to subscribers at artificial and higher levels than would have prevailed in a normal competitive market.

5. On October 3, 1968, the above-captioned cases, along with all other similar cases pending throughout the United States, were transferred pursuant to 28 U.S.C. §1407 to this Court for consolidation and coordination for pre-trial purposes only. As a result, approximately 74 cases*/ were consolidated before this Court, 55 of which were commenced by subscribers and 19 of which were commenced by injured competitors.**/

B. Prosecution of the Actions:

6. Upon consolidation and coordination of these cases, a Steering Committee of Plaintiffs' Counsel was established so that one set of plaintiffs' discovery would be filed and served. While consolidation afforded many plaintiffs' counsel the opportunity to take a back seat and receive

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*/ The Federal Government damage action is also pending before this Court.

**/ In addition, one competitor case was allowed to remain in the Eastern District of Pennsylvania. Furthermore, two earlier competitor cases had been settled prior to this §1407 transfer.

a free ride on the work of others, Petitioner has assumed an aggressive and active role. Accordingly, Petitioner became an active member of the Steering Committee and drafted the Motion for Production of Documents, which became the singularly most important and significant discovery tool in these cases.*/ Compliance with this Motion for Production directly led to the establishment of a document depository and the production therein by defendants in excess of 100,000 documents. Although not the original drafter, Petitioner likewise took an active part in reviewing and finalizing the joint set of plaintiffs' interrogatories filed in these cases.

7. With respect for the preparation for trial, each plaintiffs' counsel had the full responsibility of preparing his own case. To the best of Petitioner's knowledge, there was no coordination of effort among various plaintiffs' counsel to review and analyze the fruits of discovery and the record in U.S. v. Grinnell, supra (hereinafter "Government Record"). Accordingly, Petitioner undertook and did, in fact, make a careful review and analysis of the Government Record**/ as well as an inspection of the Depository and documents therein.

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*/ A review of the Record in the Government enforcement action, U.S. v. Grinnell Corp., Civil Action No. 2785 (D.R.I.) will reveal that the Government itself considered its case a "document" case.

**/ This revealed that the Government case was based in part on a theory different from that on which these class actions are grounded. Indeed, to the extent that the Government case relied upon predatory pricing practices, it is antagonistic to these class actions.

8. Subsequent to the initial joint filing of discovery as set forth in paragraph 6, supra, the subscriber plaintiffs and the competitor plaintiffs decided to go their separate ways on any future discovery. The compelling reason for this separation was that the claims of these two catagories of plaintiffs were diametrically opposed to each other. The subscribers' claims for damages are founded on allegations of overcharge while the competitors' claims for damages are bottomed upon allegations of predatory pricing, including defendants' sales of services below cost.

9. Defendants' Motion for Partial Summary Judgment:

(a) At an early stage in these proceedings, defendants filed a motion for partial summary judgment alleging that the Government enforcement action had terminated on June 13, 1966, the date of the Supreme Court opinion in United States v. Grinnell Corp., 384 U.S. 563, and accordingly that the applicable statute of limitations was tolled only through July 13, 1967. Defendants argued that any private suit filed subsequent to July 13, 1967 was barred by the statute of limitations.

(b) Petitioner prepared the initial draft of the plaintiffs' joint brief submitted to this Court. This Court, on consideration of briefs and affidavits and without oral argument, denied defendants' motion and held that the Government enforcement action did not terminate until September 9, 1967 and that accordingly the statute of limitations was tolled until September 9, 1968. Russ Togs, Inc. v. Grinnell Corp., 304 F. Supp 279 (S.D.N.Y. 1969). Petitioner's and plaintiffs' successful opposition to this motion preserved the viability of these law suits.

(c) This Court, sua sponte, certified for appeal, pursuant to 28 U.S.C. §1292(b), its interlocutory order denying summary judgment. Defendants, convinced of the correctness of their motion, moved for permission to appeal. Petitioner was an active participant in the preparation of the papers filed in opposition to the granting of the appeal and also in the preparation of the brief filed in the Second Circuit on behalf of plaintiffs-appellees. Petitioner argued the case in the Court of Appeals on behalf of the three above-captioned class actions and for others.*/ Argument was successful. The Court of Appeals affirmed the decision of this Court. 426 F. 2d 850 (2nd Cir. 1970).

(d) Not to be denied, defendants filed in the Supreme Court of the United States a Petition for a Writ of Certiorari. Petitioner once again was an active participant in drafting the Brief for the Respondents in Opposition. Once again, plaintiffs-respondents were successful; the Supreme Court denied certiorari. 400 U.S. 878 (1970).

10. Class representative plaintiffs were also confronted with a Motion to Dismiss the action against defendant

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*/ One counsel for certain competitor plaintiffs also presented oral argument.

Automatic Fire Alarm Company of Delaware ("AFADEL") on the ground that it was not in existence at the time of suit and accordingly, was never served. Petitioner countered that motion with a Motion to Amend under Rule 15(c), Fed. R. Civ. P., to substitute Automatic Fire Alarm Company as a defendant for AFADEL, the former having acquired the latter. The motion to amend was granted, the amendment relating back in time to the original filing date of the complaints. Order of September 19, 1969.

B. History of These Class Actions:

11. Of the 55 subscriber suits pending in this Court, the three above-captioned cases were the only national class actions filed. Subsequent to the filing of these complaints, three statewide class actions were filed on behalf of governmental entities within Connecticut, Maryland and New Jersey.*/

12. Petitioner early moved to have the above-captioned actions maintained as national class actions as alleged. This motion was stayed by Order of the Court, pending final determination of the defendants' Motion for Partial Summary Judgment (referred to in ¶9, supra). Towards the end of 1970, the Court determined the time was appropriate to decide this issue.

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*/ These 3 statewide governmental classes have been carved out of the national governmental class.

13. The class action determination was a hotly contested issue with defendants. Petitioner initially submitted an extensive brief (46 pages) in support of the class action. Defendants answered with a voluminous reply brief together with 56 printed pages of affidavits. Petitioner then filed an extensive reply brief (40 pages) together with Petitioner's affidavit. Oral argument was presented to the Court on June 18, 1971.

14. The importance of upholding the class actions herein was two-fold: (a) it was the only means of preserving the viability of claims of absent class members, whose claims would otherwise be barred by the expiration of the statute of limitations;*/ and (b) the therapeutic effect of the class action device in effectively enforcing the antitrust laws.

15. While the class action issues were awaiting Court determination, settlement negotiations proceeded between Petitioner and counsel for defendants. The parties requested the Court to delay any decision on the class action issues pending these settlement negotiations. The Court agreed, thus enabling Petitioner and counsel for defendants to negotiate the settlement now before this Court.

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*/ Defendants have made the argument that the class action, even if upheld, would not toll the statute of limitations for absent class members.

D. History of Settlement Negotiations:

16. With respect to the proposed settlement, it was Petitioner who initiated negotiations. No other counsel for any plaintiff participated in these negotiations nor in the preparation of the settlement agreement and the procedures conceived therein. The first settlement meeting was February 16, 1970. At that time, defendants' appeal from this Court's denial of their partial summary judgment motion was pending in the Second Circuit. No real progress was made, essentially because the defendants indicated that it was premature to consider settlement until defendants had exhausted the appeal procedure on their summary judgment motion.

17. A second meeting with defendants was held on March 26, 1970, following the Argument in the Second Circuit of defendants' summary judgment appeal. Once again, fruitful settlement negotiations were premature. Petitioner surmised that defendants' coolness to serious settlement negotiations was premised not only on the pendency of the appeal, but also on defendants' evaluation of the still unbriefed and undetermined class action issue, with defendants insisting that the national classes would not be upheld.

18. After the class action issues had been fully briefed by all parties and oral argument had been presented to the court, defendants accepted Petitioner's renewed invitation to discuss settlement on a class-wide basis. Thus, commencing on June 30, 1971, Petitioner travelled to New York

on four separate occasions to attend four lengthy settlement meetings. It was these meetings, interspersed with telephone calls and correspondence, which resulted in the settlement now before this Court. Thereafter the settlement agreement was negotiated and drafted and proposed orders were submitted to the Court to aid in the administration of the classes and to establish the procedures necessary for approval of the settlement. Needless to say, additional meetings were required in order to reach agreement on these settlement papers.

19. In negotiating the proposed settlement, Petitioner was ever mindful of the importance of upholding the class actions, that being the only judicial vehicle by which absent class members could have redress for the alleged damages they suffered as a result of defendants' antitrust violations. Accordingly, it was paramount to Petitioner that any settlement must provide: (a) that the three national classes be recognized and be construed as broadly as possible; (b) that the settlement period be as long as possible; and (c) that the very best notice possible be given. All these goals were attained in the proposed settlement, thus assuring that the greatest number of subscribers would be given an opportunity to participate in the litigation and share in the proposed settlement fund.

E. Administration of the Class Actions and the Settlement:

20. A printed Legal Notice was mailed on December

23, 1971 to each current central station subscriber of defendants ADT, Holmes and AFA, consisting of approximately 89,816 subscribers. In addition, Legal Notice was published (1/8th page) in each regional edition of the New York Times and the Wall Street Journal, publication occurring on the following dates: December 17, 1971, December 23, 1971 and December 30, 1971. In response to the Legal Notice, Petitioner was barraged with telephone calls and correspondence, all of which had to be and was answered.

21. As provided in Settlement Order No. 1, a class action committee was established to oversee the management and administration of the Notice program. Petitioner assumed full responsibility for the actual management and administration of this program. Accordingly, all mail received in response to the Notice, including "Sworn Statements of Claim" and "Written Requests for Exclusion", were forwarded to Petitioner's offices for processing.

22. Commencing in early January, 1972, in addition to the aforementioned telephone calls and correspondence, class members commenced filing "Sworn Statements of Claim" (hereinafter "claims") and "Written Requests for Exclusion". Each Request for "Exclusion" was reviewed and filed. Each Claim was reviewed for correctness and if invalid for any reason, was set aside to be challenged. Many challenges required mathematical calculations. A challenge letter by

the class action committee was sent to each challenged claimant setting forth the grounds for the challenge and, where possible, the amount of the claim challenged. Approximately 3,216 challenge letters have been sent.[*] Approximately 14,079 claims have now been received.

23. In response to the aforementioned challenged letters, Petitioner again received an overwhelming number of telephone calls and letters (filed with the Clerk), many of which needed response. Because the time within which to respond to the challenges was short, Petitioner undertook to respond to letters by collect telephone calls rather than in writing. In this and every other respect, Petitioner did everything possible to cooperate with and assist members of the class.

24. Because of the volume of claims filed, Petitioner has, with the approval of the class action committee, placed all claims, both challenged and unchallenged, on a computer. In this manner, administration of the final resolution of claims and allocation and distribution of the proposed settlement fund will be greatly facilitated and its accuracy assured.

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[*] Subsequent to March 2, 1972, the day when the challenge letters were to be mailed, additional claims have been filed. Challenges to these claims have been sent to the claimants. Other claims, filed within the two weeks, have recently been mailed. Because of time limitations, these claims and the challenges thereto do not appear on the computer print-out.

25. While all the foregoing work was being performed by Petitioner, and being performed under pressure to meet the deadlines set forth in Settlement Order No. 1, Petitioner was required to respond to a motion by certain class members requesting the extension of the exclusion date to May 1, 1972 and further requesting voluminous discovery from the class representative plaintiffs as well as defendants. In opposition to that motion, Petitioner prepared two memoranda of law and appeared for oral argument. The motion is currently awaiting decision by the Court.

26. Because of the number of claims filed and the necessity for accuracy in cataloging the claims on a computer, the Class Action Committee requested an extension of time of one month to file a listing of all claims, a proposed allocation of settlement and a petition for award of attorneys' fees and costs. The extension was granted in Settlement Order No. 2, dated April 3, 1972.

F. Future Work Involved:

27. Many challenges to claims will have to be resolved. Of the approximately 3,216 claims challenged, many claimants either have agreed with the challenge by the class action committee, have not responded to the challenge or have submitted a corrected claim which cures the challenge. In addition, Petitioner estimates that at least 750 claimants have requested review of their challenge. Whatever procedure the Court decides to employ to resolve these challenges, be

it through a magistrate, master or otherwise, Petitioner expects to participate actively in the proceedings and is ready, willing and able to do so.

28. Once challenges are resolved, the final allocation of the Settlement Fund must be submitted to this Court for approval, and if approved, distribution of the first installment of the settlement fund must be made. This procedure must be followed with respect to the additional four installments. Petitioner assumes full responsibility for the collection, allocation, and distribution of each installment of the Settlement Fund, of course all with prior approval and direction by the Court.

29. The hearing on approval of the proposed settlement is now scheduled for May 24, 1972. Prior thereto, Petitioner will submit to the Court a memorandum in support of the proposed settlement and present any evidence necessary or required to demonstrate that the settlement is a fair, adequate and just one.

30. In many other class action cases, the counsel for representative plaintiffs, once having negotiated a settlement, have walked away from the proceeding and left the administration of the settlement to a master appointed by the Court. Petitioner has already demonstrated and wishes to inform the Court that Petitioner will not abrogate Petitioners duties as counsel for class representatives and will continue

in whatever capacity necessary, until the final recovery (approximately four years from now) is obtained and distributed to those class members entitled to share in it. All of this will be done pursuant to the Court's supervision and approval.

II.

THE TERMS OF THE PROPOSED SETTLEMENT

31. The proposed settlement is embodied in Settlement Agreement Letter ("Agreement") dated August 27, 1971 and is attached as Exhibit "A" to Settlement Order No. 1.

32. Class Actions: Paragraph 3 of the Agreement contains defendants' agreement that these actions be upheld as class actions for the purpose of this settlement. However, in the event the settlement is not approved or otherwise is not consummated, defendants expressly "retain all rights to object to the maintenance of the actions as class actions." Accordingly a most important aspect of this settlement is the agreement of defendants to the maintenance of these actions as class actions as those classes were defined in the complaint, e.g., as national classes. Due solely to this provision, the claims of absent class members remained alive; without it, their claims would have been barred by the applicable statute of limitations. If the settlement fails, not only will the class action issue remain for this Court's determination, but

the claimants will again be subjected to the risk of having their claims barred by the statute of limitations.

33. Notice to the Class: The agreement (¶4) provides for the best Legal Notice practicable under the circumstances. This provision resulted in Notice being given as set forth in paragraph 20, supra at p.10. Petitioner believes that the Legal Notice given in this case far exceeds in effectiveness the Notice given in other antitrust class action litigation. Furthermore, the Notice informed potential class members not only of the pendency of the actions but also of the existence of the proposed settlement and its details, thus evoking a response to the Notice far greater than what it would have been had the notice not been so full and effective.

34. Cost of Notice: The Agreement [¶4(b)(iii)] expressly provides that defendants will bear the costs incurred in connection with the Legal Notice given, which cost amounted to approximately $37,895.17. Without this provision, these costs would normally be paid from the Settlement Fund, thus being borne by the participating class members.

35. The Period For Includable Transactions: In cases such as these, the settlement is normally limited to transactions occurring within the four-year period preceeding the filing of the Federal Government's Criminal or Civil

Complaint. For example, settlements in the following antitrust cases were limited to a four year period: City of Philadelphia v. Morton Salt Company, Civil Action No. 33781 (E.D. Pa.); City of Philadelphia v. Interpace Corporation, Civil Action No. 43008 (E.D. Pa.); City of Philadelphia v. General Host Corp., Civil Action No. 68-704 (E.D. Pa.); School District of Philadelphia v. Harper and Row Publishers, Inc., Civil Action No. 68C 2144 (N.D. Ill.), Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation, Civil Action No. 41773 (E.D. Pa.). In Philadelphia Electric Co. v. Anaconda American Brass Company, Civil Action No. 41734 (E.D. Pa.), the settlement period was six years.

In the cases sub judice, four years prior to the Government enforcement complaint would include the period 1957 to 1961. However, Petitioner was successful in including within the settlement all payments to the defendants for installations made and services rendered within an 11-1/4 year period, April 13, 1957 through July 11, 1968. Because of this elongated period, potential class members who may not have taken service from defendants during the 1957-1961 period are included within the Settlement and will share in the Settlement Fund.

36. The Settlement Fund: In settlement of these cases as national class actions, defendants have agreed to pay $10,000,000, to be paid in five equal installments, as follows:

Upon Entry of Final Judgment:*/	$2,900,000
On January 15, 1973:	$2,900,000 plus interest
On January 15, 1974:	$2,900,000 plus interest
On January 15, 1975:	$ 325,000 plus interest
On January 15, 1976:	$ 975,000 plus interest

Defendants have the right to prepay all or any portion of any installment, without penalty but with accrued interest up to the date of payment.

37. Interest on Settlement Fund: Interest on the four installment payments is to be calculated at the prime rate prevailing at time to time during that period at the Chase Manhattan Bank, New York, New York, plus one point. Assuming that the prime rate averages 5% during the period of payments, interest will accrue at the rate of 6% or in a total amount of $695,452.00. Parenthetically, this amount of interest is more than ample to cover any costs of litigation and administration, with the substantial excess available for distribution among those sharing in the proposed settlement. Moreover, this interest is not subject to any award of attorneys' fees.

III.

PETITIONER AND PETITIONER'S REQUEST FOR FEES AND REIMBURSEMENT OF COSTS

A. Standing of Petitioner at the Antitrust Bar:

3. David Berger and David Berger, P.A., despite its small size, (originally five, presently eight lawyers), have earned the reputation of being among the foremost

plaintiffs' antitrust counsel in the country. Petitioner's antitrust cases which have been completed or which are now pending are the following:

A. Litigation Completed:

City of Philadelphia v. Morton Salt Company, 248 F. Supp. 506 (E.D. Pa. 1965);

Philadelphia Electric Company v. Anaconda American Brass Company, 43 F.R.D. 452 (E.D. Pa. 1968);

Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969);

City of Philadelphia v. Sterling Faucet Company, (E.D. Pa. C.A. No. 43923);

Regal-Tyson, Inc. v. Globe Ticket Company (E.D. Pa. C.A. No. 43221);

City of Philadelphia v. General Host Corporation, (E.D. Pa. C.A. No. 68-704);

City of Philadelphia v. United States Steel Corporation, (E.D. Pa. C.A. No. 39517);

City of Philadelphia v. Interpace Corporation, (E.D. Pa. C.A. No. 43008).

Kirihara v. Bendix Corp., 1969 CCH Trade Cases ¶72,941 (D. Haw. 1969).

B. Pending Cases:

County of Lackawanna, Pennsylvania v. Automobile Manufacturers Association (C.D. Cal., M.D.L. Docket No. 31) (re motor vehicle air pollution control devices);

City of Philadelphia v. Emhart Corporation, 50 F.R.D. 232 (E.D. Pa. 1970) (re master lock and key systems);

City of Philadelphia v. Chas. Pfizer and Sons, Inc., (E.D. Pa. C.A. No. 68-144) (re antibiotics);

Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation, (E.D. Pa. C.A. No. 41773) (re plumbing fixtures);

City of Detroit v. American Bakeries Company, (E.D. Mich. C.A. No. 33046) (re bakery products);

City of Philadelphia v. American Oil Company, 53 F.R.D. 45 (D.N.J. 1971) (wholesale and retail gasoline);

Holy Redeemer Hospital v. Bristol-Myers Company, (D.D.C.C.A. No. 338-71) (re ampicillin);

Philadelphia Housing Authority v. Fibreboard Corporation, (N.D. Cal., C.A. No. 51005) (re gypsum wallboard);

City of Philadelphia v. General Motors Corporation, (E.D. Pa., C.A. No. 70-2753) (re Governmental auto fleet discounts);

State of Michigan v. American Cast Iron Pipe Company, et al., (N.D. Ala. 71-1122-S) (re cast iron pipes).

In City of Philadelphia v. Morton Salt Company, supra, Petitioner acted as lead counsel in establishing a national Governmental class under Rule 23 prior to its amendment against producers of rock salt. The copper pipe and brass mill tube cases were the first price-fixing treble damage actions under amended Rule 23 in which a national class was upheld. 43 F.R.D. 452 (E.D. Pa. 1968). In Illinois v. Harper & Row Publishers, Inc., supra, Petitioner successfully represented a class on behalf of governmental bodies and school districts throughout the United States. In City of Philadelphia v. Interpace Corporation, supra, Petitioner successfully represented eight statewide Governmental classes Interpace Corporation v. City of Philadelphia, 438 F. 2d 401 (3rd Cir. 1971). Petitioner is co-lead counsel in two pending nationwide class actions, one against the manufacturers of master lock and key systems, City of Philadelphia v. Emhart Corporation, 50 F.R.D. 232 (E.D. Pa. 1970) and the other against the automobile manufacturers for conspiring to delay the development and installation of air pollution control devices on domestic automobiles, County of Lackawanna v. Automobile Manufacturers Association, 52 F.R.D. 398 (C.D. Cal. 1970); appeal pending. David Berger successfully obtained certification of two national classes in that case and argued in support thereof in the Ninth Circuit. The foregoing incomplete list of cases illustrates the vast experience of plaintiffs' counsel in antitrust litigation.

39. In addition to the foregoing, David Berger, Esq., the principal plaintiffs' trial lawyer in these class actions and under whose direction every phase of this litigation was conducted, is nationally recognized as an outstanding trial attorney, as evidenced by the following positions held by him:

a. City Solicitor, City of Philadelphia 1956 through 1963

b. Member of United States Supreme Court Advisory Committee which formulated Rules of Evidence for the United States Courts

c. Fellow, American College of Trial Lawyers

d. Fellow, International Academy of Trial Lawyers; Chairman, Antitrust Committee

e. Member, Advisory Board of the Bureau of National Affairs, Inc. re Antitrust Trade and Regulation Report

f. Former Chancellor, Philadelphia Bar Association.

As City Solicitor of Philadelphia, Petitioner Berger commenced one of the first of the Electrical Equipment antitrust cases on behalf of a non-federal government entity. David Berger has frequently lectured to groups of antitrust lawyers throughout the United States, including the Practising Law Institute, the New York State Bar Association, the Texas State Bar Association and The Philadelphia Bar Association. Mr. Montague will be lecturing before the Pennsylvania Bar Institute. Mr. Berger has published articles relating to antitrust and class actions.

B. Time Devoted and to be Devoted to These Actions:

40. During the period July 1, 1968 through April 19, 1972 Petitioner-Firm has dedicated a total of 6,233.25 hours to this litigation, not including secretarial and clerical help. Many of these hours have been odd hours, i.e., evenings and

weekends. From July 1, 1968 through April 19, 1972, Messrs. Berger, Montague, Schambelan and Newberg, senior attorneys in David Berger, P.A., spent a total of 1,814.45 hours. Messrs. Greenburg, Meredith, Lally and Rodos, attorneys, and Ms. Cohen, Esquire, spent a total of 542.25 hours. In addition, petitioner has for several years employed para-professionals under the direct supervision of the senior attorneys to assist in the preparation of litigation. These para-professional[*] have spent a total of 3,876.55 hours in connection with this litigation up to and including April 19, 1972. In addition, Petitioner, in order to process claims and calculate challenges, has used the services of other non-legal personnel, including professional accountants, who have through April 19, 1972, spent 897 hours in connection with this litigation.

41. In addition to the foregoing, substantial time (estimated to approach 1,000 hours) will be required by Petitioner to complete the procedures outlined in paragraphs 27 through 30, supra, in order to bring this settlement and litigation to its successful culmination and to distribute the proceeds thereof in accordance with the order of this Honorable Court.

42. Petitioner-Firm is a professional association comprised of eight attorneys and is of limited resources. Over the course of this litigation, Petitioner has made approximately

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[*] The para-professional staff employed by Petitioner has been trained by the senior attorneys in Petitioner's Firm to assist in the preparation and administration of antitrust litigation. One member of the staff has been trained at the Para-Legal Institute in Philadelphia.

forty trips to New York City for meetings with counsel, pre-trial conferences and court arguments, and visits to the document depository. Indeed, many additional trips are anticipated. The time and effort expended by Petitioner in the prosecution of these cases have mostly been demanding and have been performed under the severe pressures inherent in this type of litigation.

C. Expenses Incurred and to Be Incurred:

43. Expenses Incurred: To March 31, 1972 out-of-pocket expenses on behalf of the representative plaintiffs and the class members have totalled $14,918.73. These costs represent both costs of conducting the litigation and costs of administering the class actions and the settlement procedures. With approximately 14,079 claims filed, the costs to date represent approximately $1.06 per claim. The economy of out-of-pocket costs in these cases was possible only due to Petitioner's experience and expertise in this type of litigation.

44. Expenses To Be Incurred: Additional expenses are anticipated and will be incurred relating to the completion of the administration of the claims, the settlement hearing, and allocation and distribution of settlement proceeds, if the proposed settlement is approved. As previously stated, all claims are being recorded on a computer. While only initial billings have yet been made, it is estimated that the initial cost for computerization of the claims, including challenged claims,

will approximate $12,000. Additional computer costs will be forthcoming as the outcome of challenges are recorded, revised print-outs are required and in the event of settlement approval, form letters and checks are printed. In addition, it is forseen that additional expenses will arise for xeroxing, mailing, telephone, travel, banking, transcripts and other unavoidable costs incidental to completing these cases. Certain of these costs will recur with the distribution of each installment of the Settlement Fund and can be deducted from the interest earned on those installments.

45. Petitioner has not been reimbursed for any out-of-pocket expenses incurred to date.

D. Retainer Agreements With Clients:

46. Petitioner has with each class representative plaintiff a contingent fee agreement equal to or greater than 25% of any recovery. Petitioner has to date received no legal fees whatsoever in connection with the commencement, prosecution and administration of these cases. Petitioner's entire fee rests upon obtaining a recovery in these cases and upon the amount of that recovery. In this manner, Petitioner has assumed all the risks of litigation with respect to an award of attorney's fee.

E. Request For Fee:

47. In light of all the foregoing circumstances,

Petitioner is requesting that in the event the proposed Settlement is approved as fair, adequate and reasonable, Petitioner be awarded attorneys' fees in an amount equal to 25% of the gross principal Settlement Fund, exclusive of interest,*/ and that the fee not be entirely paid out of the first settlement installment, but be paid proportionately out of each of the five settlement installments as they become due.

48. It is due solely to Petitioner's diligent and timely filing of these actions as national class actions and Petitioner's diligent prosecution of them as class actions that the claims of absent class members - otherwise barred by the statute of limitations - may still be asserted. Moreover, the settlement as proposed assures the absent claimants of a recovery and eliminates the risks inherent in the litigation of the class action issues that the classes may not be upheld.

49. In negotiating the settlement, Petitioner held paramount that the scope of the classes be as broadly defined as in the complaints so that the most claimants possible could share in the settlement. Likewise, Petitioner obtained a settlement covering an unusually large period of 11-1/4 years. Moreover, Petitioner succeeded in giving the best practicable

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*/ Petitioner is not seeking any fee from the interest earned by the Settlement Fund. Thus, in reality, the fee Petitioner is seeking is less than 25% of the total recovery to be received by participating class members.

notice evidenced by the overwhelming response as set forth below.

50. The total number of claims filed by class members is 14,079. The total amount of transactions listed in the claims for the 11-1/4 year period of the settlement is $329,598,877.81.*/ The total dollar amount of transactions unchallenged is $292,298,515.69.*/ Assuming after all challenges are resolved that the total of acceptable transactions approximates $310,000,000, the Settlement Fund, exclusive of interest, represents a recovery of approximately 3.23% and with interest approximately 3.46%.

If the settlement was restricted to the more traditional 4-year period preceding the filing of the Government enforcement action, based on $310,000,000 of acceptable claims, the recovery would approximate 9.08% without interest, and including interest would approximate 9.73%. Excluding 8% Excise Tax, it would approximate 10.58%.

51. These therapeutic results are to be contrasted with what reasonably could have been proposed as a settlement --

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*/ Almost all claimants included in the sum of their transactions an 8% Excise Tax. Accordingly, to determine the true dollar amount of the total transactions involved, 8% thereof should be deducted. This would result in total transactions being approximately $303,230,967.59 and unchallenged transactions being $268,914,634.43. Assuming the total acceptable transactions would then ultimately equal approximately $285,200,000 ($310,000,000 less 8% Excise Tax), the rate of gross recovery, including interest, would be 3.76%.

(a) only published notice be given instead of direct mailed notice to over 89,000 subscribers; (b) that the Notice not contain any reference to the settlement;*/ and (c) that the settlement be limited to accredited central station protective equipment installed or services rendered within the four-year period prior to the institution of the Government enforcement action -- in which case the response would have been considerably less and the percentage of recovery enhanced. But this would only be from a statistical point of view. In reality, the proposed settlement and the procedures followed pursuant thereto result in a much broader distribution of the benefits obtained.

52. The majority of class members who filed statements of claim, like the class representatives, were too small to commence litigation on their own behalf. Accordingly these claimants benefitted greatly from these class actions. Many other claimants, particularly banks and ADT's National Accounts;**/ had sufficiently large claims to merit commencement of their own individual actions, as did most of the

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*/ In the National Cast Iron Pipe antitrust cases pending in the Southern District of Alabama, Notice was given of the pendency of national and statewide governmental class actions, without notice of any settlement (no settlement exists in those cases.) Petitioner has been informed that approximately only 3% of the class memberships responded affirmatively to such notice.

**/ i.e., Chase Manhattan Bank; First National City Bank; General Motors Corporation; Ford Motor Company; Great Atlantic and Pacific Tea Company.

plaintiffs who filed the 55 independent non-class actions. Likewise, these large claimants, who could have done something but did nothing, benefitted greatly from these class actions and the proposed settlement.

53. Petitioner urges that the result obtained by reason of the proposed settlement, in light of all the facts and circumstances hereto, is an excellent one. The effective, efficient and economical procedures in the filing and prosecuting of these actions as class actions bespeaks the ability and expertise of the Petitioner.

54. In light of the benefits conferred upon the classes as hereinbefore set forth, in view of the services which Petitioner has performed, in light of the fee agreements of Petitioner with the class representative plaintiffs, both governmental entities and private, and in view of the personal and financial risks which Petitioner undertook to file and prosecute these national class actions, Petitioner respectfully submits that it is fair and equitable and in accordance with established legal pricniples for the Court to approve an award to Petitioner of 25% percent of the gross recovery, exclusive of interest, (and less than 25% including interest on the principal Settlement Fund) which these classes will receive in the event the proposed settlement is approved.

David Berger

Sworn to and Subscribed
before me this 20th day
of April, 1972.

Helen K. Carter
Notary Public

Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires July 28, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al	:	68 Civ. 4026
v.	:	
GRINNELL CORPORATION, et al	:	(E.D.Pa. Civ. 68-1478)

MANHATTAN-WARD, INC., et al	:	68 Civ. 4028
v.	:	
GRINNELL CORPORATION, et al	:	(E.D.PA. Civ. 68-1489)

1225 VINE STREET BUILDING, INC., et al	:	68 Civ. 4027
v.	:	
GRINNELL CORPORATION, et al	:	(E.D.Pa. Civ. 68-1479)

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA:
ss:
COUNTY OF ALLEGHENY :

RALPH LYNCH, JR., being duly sworn deposes and says:

1. I am, and have been since January 13, 1970, City Solicitor of the City of Pittsburgh, Pennsylvania, a class member in the above-captioned litigation. I submit this affidavit with respect to the Petition filed by David Berger, Esquire and David Berger, P.A., Attorneys at Law, (hereinafter "Petitioner") for award of reasonable fees for their services to the classes of claiments sharing in the proceeds of the settlement of this litigation.

2. I am familiar with the document being filed by David Berger, Esquire and David Berger, P.A., Attorneys at Law, entitled "Petition of Class Representatives for Allowance of Counsel Fees and Costs, in which that firm seeks reimbursements for out-of-pocket expenses incurred and to be incurred, and, as fees, a sum totaling 25% of the Settlement Fund, without interest, to be distributed to the class claimants they have represented. I am also familiar with the Memorandum in Support of this Petition. If the fee application should be granted, the fee would be paid over the course of the next five years. Needless to say, all of these fees have been totally contingent on recovery and the amount of the recovery.

3. No doubt the total fee requested here may be questioned on its face by one who is not familiar with this litigation, the Petitioner's role in vigorously prosecuting it and in protecting the rights of the class members nationwide, and the broader effort to afford effective protection to public and private parties alike through the private enforcement of the antitrust laws. My personal familiarity with this case and other antitrus cases in which the City has participated convinces me, however, that the requested fee is fair and reasonable for the extraordinary services to the public interest rendered by Petitioner in the approximately four years of work on this case which was undertaken solely on a basis contingent upon the success of Petitioner's efforts. Granting Petitioner's Application in complex and protracted litigation of this public importance is thoroughly justified. It will assure that similar litigation will be undertaken to protect the interests of injured parties

otherwise unprotected, both public and private, many thousands of whom would otherwise have no redress possible at all absent such class litigation.

4. This settlement represents the first major settlement made for subscriber plaintiffs and class members in all of the various related pending actions which have been consolidated for pretrial purposes in the Southern District of New York. It accomplishes this all-important break-through and secures this substantial recovery for many thousands of subscribers long after the statute of limitations period has expired. Moreover, this litigation has been hotly contested by eminent defense counsel of the highest standing and skill. This class litigation is protecting the public interest through the antitrust laws--and doing it effectively and economically. By defining and construing the classes as broadly as possible, and giving individual and published notice nationwide in an all encompassing manner to potential claimants, the response and settlement participation which has been generated is a tribute to the breadth of public interest served by the class representatives.

5. The $10,000,000 settlement figure for this class is of large magnitude even for this sizable class response. And, unlike most other similar settlements, including for example, the antibiotics antitrust settlements, where the large cost of legal notice to the class is a cost which is subtracted from the settlement sum before distribution to claimants, Petitioner has enhanced this already large settlement by arranging for the defendants in this litigation to assume all costs and expenses

in connection with the extensive nationwide mailing and publishing of legal notice to class members. The settlement sum is further enhanced by the interest which will accrue on that portion of the settlement which will be deferred for payment. This interest far exceeds the cost of litigation, administration of the class action, and the distribution of this settlement to all claimants. The balance of the interest would then be available for distribution to class members without any further deduction for counsel fees. This virtually cost-free aspect for the administration of the settlement distribution made possible from interest funds which are not charged with legal fees is a real bonus to settlement participants and makes the effective "net" recoveries to such beneficiaries all the higher.

6. Private antitrust litigation is in furtherance of a strong public policy. This importance is of special significance when, as here, the class litigation involves purchases by public entities and by many private claimants whose claims are too small to justify individual legal redress from an economic standpoint. Not only does this class settlement open the only possible door for recoupment by so many claimants, but also, this private antitrust enforcement carries with it the deterrence against future violations by these and other companies. The salient effects of this deterrence in the entire perspective of affording increased consumer protection for everyone cannot be over-emphasized.

7. As the volume of this consumer antitrust litigation has increased, it has been the experience of the City's Law Department and other similar agencies that private counsel are needed if this effort is to be continued effectively.

8. Through Petitioner's efforts, the City of Pittsburgh has received substantial antitrust recoveries in other actions involving such products as copper pipe, rock salt, antibiotics, and concrete pipe. In every instance, the City engaged Petitioner on the basis of a 25% contingent fee, plus proportional expenses, which the City considers fair and reasonable. The quality of counsel for the class representatives is very high and the results achieved for the City in this and other cases is due solely to their efforts. In the case sub judice, the City stands to recover damages even after the statute of limitations has expired for new actions--solely because of the diligent and effective prosecution of these class actions. Accordingly, the City of Pittsburgh expressly approves the allowance of a 25% fee to Petitioner out of the City's share of settlement proceeds and supports the petition for similar fees from the class settlement fund generally.

Ralph Lynch, Jr., City Solicitor
City of Pittsburgh
Department of Law

Sworn to and subscribed
before me this 20th day
of March, 1972.

NOTARY PUBLIC
Agnes L. McDonough, Notary Public
PITTSBURGH, ALLEGHENY COUNTY, PA.
My Commission Expires September 22, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al. v. GRINNELL CORPORATION, et al.	68 Civ. 4026 (E.D. Pa. Civ. 68-1478)
MANHATTAN-WARD, INC., et al. v. GRINNELL CORPORATION, et al.	68 Civ. 4028 (E.D. Pa. Civ. 68-1489)
1225 VINE STREET BUILDING, INC., et al. v. GRINNELL CORPORATION, et al.	68 Civ. 4027 (E.D. Pa. Civ. 68-1479)

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
:SS:
COUNTY OF MONTGOMERY :

A. R. SEITELL, being duly sworn according to law, deposes and says:

1. I am the President of Drexel Dynamics Corporation, one of the named class representatives in the above class litigation, and have held this position since May 1970. Although Drexel's suit was authorized by my predecessor, I have personally approved its continuation and followed its progress.

2. During the settlement period involved, Drexel has purchased central fire alarm protection services in the sum of $18,770.35.

3. Since Drexel Dynamics Corporation filed its complaint in July 1968, it has been represented in this litigation by David Berger and the firm of David Berger, P.A., Attorneys at Law (hereinafter "Petitioner"). As it is well known, Petitioner has handled the general aspects of our case, including all appearances before the court, preparation for trial, negotiation with the defendants and counsel for other plaintiffs and the general administration of the settlement.

4. Drexel Dynamics is extremely pleased with the excellent legal representation which it and the class it represents have had in this litigation. We are confident that the successful settlement negotiated in this litigation has been directly achieved as the result of the high qualifications of counsel and their aggressive prosecution at all stages of this litigation.

5. Since we have had no funds available to hire counsel in this litigation on an hourly basis, we had to find counsel willing to undertake such efforts on a contingent fee basis. Drexel has been indeed very fortunate in being able to employ Petitioner as its attorney in this case. Because the size of its claim was not sufficiently substantial to justify independent litigation, it

has only been through the class action device and the contingent fee arrangement with counsel that Drexel has been able to obtain any legal redress at all in this matter.

6. Although the original contingent fee arrangement with Petitioner for representation of Drexel Dynamics Corporation in this litigation was at a level of 33-1/3%, Petitioner has advised us that he is seeking a counsel fee of 25% of the settlement fund for the entire class and has agreed to waive his fee to our company which is in excess of that proportional share of legal fees which shall ultimately be approved by the Court. When viewed in the perspective that Petitioner's fee has been entirely contingent on success which was not at all likely in July 1968, I think that this it is a fair and equitable payment for all the risk and effort involved in this litigation. It is common to find that contingent fees are usually considerably larger because they cover the likelihood that the action initiated may not be successful and will not yield any fees. Drexel has no hope of any recovery in these kind of cases unless it can hire outstanding counsel on a contingent fee, and 25% is a very modest price to pay when the alternative is no recovery at all.

DREXEL DYNAMICS CORPORATION

By: ______________________
A. R. Seitell, President

Sworn to and Subscribed
before me this 17th day
of March 1972.

Theresa C. Riedinger
Notary Public
Notary Public, Horsham Twp., Montg. Co.
My Commission Expires May 26, 1975

UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

CITY OF DETROIT, et al. : 68 CIV 4026
:
v. :
:
GRINNELL CORPORATION, et al. : (E.D.Pa. Civ. 68-1478)

MANHATTAN-WARD, INC., et al. : 68 CIV 4028
:
v. :
:
GRINNELL CORPORATION, et al. : (E.D.Pa Civ. 68-1489)

1225 VINE STREET BUILDING, : 68 CIV 4027
INC., et al. :
:
v. :
:
GRINNELL CORPORATION, et al. : (E.D.Pa. Civ. 68-1479)

MEMORANDUM OF COUNSEL FOR THE CLASS REPRESENTATIVES IN SUPPORT OF THEIR PETITION FOR COUNSEL FEES AND COSTS

David Berger
H. Laddie Montague, Jr.
DAVID BERGER, P.A.,
ATTORNEYS-AT-LAW
1622 Locust Street
Philadelphia, PA 19103
Petitioner

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MEMORANDUM OF COUNSEL FOR THE CLASS REPRESENTATIVES IN SUPPORT OF THEIR PETITION FOR COUNSEL FEES AND COSTS

A. The Source Of The Court's Authority For Awarding Fees And Costs In This Case

This petition for an award of attorneys' fees from the Settlement Fund is based on the court's power in actions under Federal Rule 23 to award counsel for class representatives appropriate compensation when their diligence and foresight has benefited the members of the class and property or a fund has been created or preserved. See 7A Wright & Miller, Federal Practice and Procedure §1803. See also 3B Moore, Federal Practice ¶23.91. The authority to award fees under these circumstances is equitable in origin, having its roots in two important nineteenth century decisions by the United States Supreme Court. Trustees v. Greenough, 105 U.S. 527 (1882) and Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885).

In Greenough, the State of Florida had secured a bond issue of the Florida Railroad Company by conveying more than ten million acres of state-owned land to trustees who then collusively sold hundreds of thousands of acres at nominal prices. "A large holder" of the Railroad Company's bonds, sued on behalf of himself and the other bondholders to set aside the transfers as fraudulent and for the appointment of a receiver. He recaptured the looted assets and secured large payments to the bondholders, which they had accepted. The successful bondholder then presented a claim for reimbursement of his lawyers' fees. The court concluded that to deny reimbursement "would not only be unjust to him but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself. * * * They ought to contribute their due proportion of the expenses he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution." Id. at 532.

This important principle is not limited to a reimbursement of the plaintiff for fees paid to plaintiff's counsel. The Supreme Court has long upheld the attorney's right to fees from the fund recovered. In Pettus, the claim on the "fund" was asserted directly by the attorneys. This was met by the objection that the petitioning attorneys should recover no more than they had agreed to receive from their clients. The Supreme Court took the position that the original action, a creditors' bill, in effect had been a class action, that the attorneys always had intended to charge all of the creditors who took advantage of the decree, and that they would have charged their own clients more had that not been true. With regard to the absence of any agreements between the attorneys and the absent members of the class, the Court pointed out that these members knew the action was brought in part for their protection and, as in Greenough, "every ground of justice" required payment by those who "accepted the fruits" of another's labors.

The principles articulated in Greenough and Pettus have been reaffirmed and extended by the Supreme Court in numerous more recent decisions. See, e.g., Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Sprague v. Ticonic National Bank, 307 U.S. 161 (1939); United States v. Equitable Trust Co. of New York, 283 U.S. 738 (1931). Their universal acceptance reflects the fact that the equitable proposition underlying a federal court's power to award counsel fees out of a fund created or preserved through someone's efforts is a simple and obvious one. "One jointly interested with others in a common fund who brings and prosecutes a suit for its preservation and administration is entitled to reimbursement of his costs, including reasonable fees of his counsel, to be paid out of the fund itself." Bishop & Collins v. Macon Lumber Co., 149 F. Supp. 46 (W.D. Ky. 1957). See also Kahan v. Rosenstiel, 424 F. 2d 161 (3d Cir. 1970), certiorari denied, 398 U.S. 950 (1970); Freeman v. Ryan, 408 F.2d 1204 (D.C. Cir. 1968); Gibbs v. Blackwelder, 346 F. 2d 943, 945 (4th Cir. 1965) (The "timid fellows who held back until the fruits of the pioneer's success were laid before them" should bear their portion of the burden.); Washington Gas Light Co. v. Baker, 195 F.2d 29 (D.C. Cir. 1951); O'Hara v. Oakland County, 136 F.2d 152 (6th Cir. 1943); City of Wewoka, Oklahoma v. Banker, 117 F.2d 839 (10th Cir. 1941); Holthusen v. Edward G. Budd Mfg. Co., 55 F. Supp. 945 (E.D. Pa. 1944).

In the Mills case, its most recent discussion of this subject, the Supreme Court provided the following rationale for extending the Greenough doctrine:

> * * * While the general American rule is that attorneys' fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery. A primary judge-created exception has been to award expenses where a

> plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself. *** To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.

396 U.S. at 391-92.

It is important to note at this juncture that petitioners' application is not based on Section 4 of the Clayton Act, 15 U.S.C. §15. Under that statute "a reasonable attorney's fee" is permitted in a private treble damage antitrust suit as an additional element of the recovery against a party found to have violated the antitrust laws. As indicated above, the present application differs from a proceeding under that statute because the attorneys' fee will be paid out of the Settlement Fund created for the benefit of the plaintiff classes; it will not be assessed against the defendants. This distinction was expressly commented on by Judge Fullam in Philadelphia Electric Co. v. Anaconda American Brass Co., 47 F.R.D. 557 (E.D. Pa. 1969). Thus, although they shed some general light on the question of what is a "reasonable attorneys fee," recent cases under Section 4 of the Clayton Act, such as

Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478 (S.D. N.Y. 1970), affirmed, 449 F. 2d 51 (2d Cir. 1971) (certiorari granted), and Farmington Dowel Products Co. v. Forster Mfg. Co., 297 F. Supp. 924 (D. Me. 1969), modified, 421 F. 2d 61 (1st Cir. 1970), after remand, 436 F. 2d 699 (1st Cir. 1970), are not directly germane to this petition.

Similarly, this fee application is not predicated on the contingent fee contracts that petitioners have entered into with each of the plaintiff-representatives in these three actions. As will be discussed more fully later in this memorandum (see Section F, infra), however, that contract, which would give counsel a fee of 25% of any amounts recovered in these actions on behalf of their clients does indicate that this application for an award from the Settlement Fund is both fair and reasonable.*/

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*/ In some instances, petitioners' contingent fee contract calls for more than 25% of the recovery. Since petitioners will not charge their clients any more than is awarded by this court, there is no multiple fee problem as there was in Farmington Dowel Products Co. v. Forster Mfg. Co., 297 F. Supp. 924 (D.Me. 1969), modified 421 F. 2d 61 (1st Cir. 1970), after remand, 436 F.2d 699 (1st Cir. 1970).

B. The Standard To Be Applied By The Court In Fixing An Appropriate Attorney's Fee

By its very nature, this application is addressed to the sound discretion of the court. See generally Griffin v. County School Bd. of Prince Edward Count, Virginia, 363 F. 2d 206 (4th Cir. 1966); Green v. Transitron Electronic Corp., 326 F. 2d 492 (1st Cir. 1964); Bell v. School Bd. of Powhatan County, Virginia, 321 F. 2d 494 (4th Cir. 1963); North Drive-In Theatre Corp. v. Park-In Theatres, Inc., 248 F. 2d 232 (10th Cir. 1957); Rolax v. Atlantic Coast Line R. Co., 186 F. 2d 473 (4th Cir. 1951); Giesecke v. Pittsburgh Hotels, Inc., 180 F. 2d 65 (3rd Cir. 1950); United States v. Anglin & Stephenson, 145 F. 2d 622, 630 (10th Cir. 1944). And, in light of the equitable genesis of the court's authority, the award must be reasonable in terms of all the circumstances in the case.

There seems to be little dispute concerning the factors to be taken into account by the court.[*] A typical statement of the judicially created standard appears in Angoff v. Goldfine, 270 F. 2d 185, 189 (1st Cir. 1959), a stockholder derivative suit, in which the court stated that the following elements should be considered:

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[*] The criteria used by the courts are similar to those found in Canon 12 of the Canons of Professional Ethics. See also Code of Professional Responsibility EC 2-18, EC 2-20, ED 2-22, DR 2-106, and DR 2-107.

> * * *[T]he amount recovered for the corporation, the time fairly required to be spent on the case, the skill required and employed on the case with reference to the intricacy, novelty and complexity of issues; the difficulty encountered in unearthing the facts and the skill and resourcefulness of opposing counsel; the prevailing rate of compensation for those with the skill, experience and standing of the attorneys, accountants or others involved; the contingent nature of the fees, with the accompanying risk of wasting hours of work, overhead and expenses (for it is clearly established that compensation is awarded only in the event of success); and the benefits accruing to the public from suits such as this.

Similar formulations can be found in numerous other decisions, See, e.g., Denney v. Phillips & Buttoroff Corp., 331 F. 2d 249 (6th Cir. 1964), certiorari denied, 379 U.S. 831 (1964); Fox v. Glickman Corp., 253 F. Supp. 1005, 1015 (S.D.N.Y. 1966); Cherner v. Transitron Electronic Corp., 221 F. Supp. 55 (D. Mass. 1963), affirmed sub nom., Green v. Transitron Electronic Corp., 326 F. 2d 492 (1st Cir. 1964); Perlman *v. Feldmann*, 160 F. Supp. 310 (D.C. Conn. 1958); *Cape Cod Food Products, Inc. v. National Cranberry Association*, 119 F. Supp. 242 (D. Mass. 1954); *In re Osofsky*, 50 F. 2d 925 (S.D.N.Y. 1931); *Matter of Potts*, 213 App. Div. 59, 209 N.Y. Supp. 655 (4th Dep't 1925), affirmed without opinion, 241 N.Y. 593, 150 N.E. 568 (1925).

The factors enumerated by the First Circuit in *Angoff* have been applied in private antitrust treble damage cases similar to the instant actions. For example, in *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 47 F.R.D. 557, 559 (E.D. Pa. 1969), the court, in the course of granting a counsel fee of 25% of the settlement under circumstances almost identical to those now before the court*/ stated that the figure was reasonable because

> * * *(1) The abilities and standing of petitioning counsel are very high. (2) The results achieved were remarkably favorable to the interests of the class-members. (3) The enforcement of the antitrust laws in this case was solely due to the efforts of the petitioners, as the

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*/ The *Philadelphia Electric* case is analyzed in greater detail in Section F(1), infra.

> statute of limitations would have barred all of the claims here involved, but for counsel's enterprise and foresight in filing class actions. (4) The treble-damages feature of antitrust recoveries means that counsel can be generously paid without actual "cost" to the claimants; i.e., the fees of counsel merely reduce a windfall.

Even a cursory examination of the decided cases makes it clear that the question of what constitutes a reasonable fee in a particular case is a multi-faceted one. It does not depend upon a simple multiplication of a reasonable rate of compensation by the number of hours devoted to the case by counsel. This was recognized in the Southern District of New York in *Woodbury v. Andrew Jergens Co.*, 37 F.2d 749 (S.D.N.Y. 1930), when the court stated:

> The value of a lawyer's services is not measured by time or labor merely. The practice of law is an art in which success depends as much as in any other art on the application of imagination--and sometimes inspiration--to the subject-matter. The exercise of these faculties may occur at any stage in a case, though their influence on the course of the proceeding may not be established till its outcome. In order, therefore, accurately to chancer the value of a lawyer's services, one must almost always examine them in the light of the event.

Id. at 759. See also *Powell v. Pennsylvania R.R. Co.*, 267 F.

2d 241, 245 (3d Cir. 1959); Epstein v. Weiss, 1971 CCH Securities Law Reports ¶92,938 (E.D. La. 1970).

The question of what constitutes a reasonable fee simply is too complex to be resolved in terms of the amount of time the attorney invests in the particular matter. See Freeman v. Ryan, 408 F. 2d 1204 (D.C. Cir. 1968); McKittrick v. Gardner, 378 F. 2d 872, 875 (4th Cir. 1967); Fox v. Glickman Corp., 253 F. Supp. 1005, 1015 (S.D.N.Y. 1966). As a prominent commentator on the subject of attorneys' fees has put it:

> * * * One thousand plodding hours may be far less productive than one imaginative, brilliant hour. A surgeon who skillfully performs an appendectomy in seven minutes is entitled to no smaller fee than one who takes an hour; many a patient would think he is entitled to more.

Hornstein, Legal Theraupeutics: The "Salvage" Factor in Counsel Fee Awards, 69 Harv.L.Rev. 658, 660 (1956). A New York State court expressed the same sentiment when it stated:

> * * * [T]he real value of an attorney's services may be the result of his thought about the legal questions involved, while

> away from his office, at home, or elsewhere. An idea thought out in bed at night may be the most valuable part of an attorney's services, and may constitute a solution of the vital question involved in a litigation. * * * *I do not think items as to time actually employed in work on the case are of much importance. It is the ability of the attorney and his capacity and success in handling large and important matters and in commanding large fees therefor, the amount involved and the result obtained, which are of prime importance in determining what constitutes a just and reasonable charge*.

Matter of Potts, 213 App. Div. 59, 62, 209 N.Y. Supp. 655, 658 (4th Dep't 1925), affirmed without opinion, 241 N.Y. 593, 150 N.E. 568 (1925) (emphasis added).

On occasion, of course, a consideration of some of the factors suggested by the courts may lead to an award that compensates the attorney at what may appear to be a very handsome rate, one that even may be beyond what he might command had he been retained on an hourly basis rather than under a contingent fee agreement. But, as will be discussed in greater detail below (see Sections D, E, infra), this simply may reflect the need to provide incentives to further certain policy objectives and be a recognition of the economic "facts of life" of the legal profession.

In addition, slavish adherence to a simplistic so-many-dollars-per-hour compensation approach may have deleterious side effects. As Professor Hornstein has remarked:

> * * * [W]hen hours become a criterion, economy of time may cease to be a virtue. Inexperience, inefficiency, even incompetence will be rewarded. Expeditious termination of litigation will be discouraged--to the great cost of all concerned, including the state.

Legal Therapeutics" The "Salvage" Factor in Counsel Fee Awards, 69 Harv.L.Rev. 658, 660-61 (1956). Judge Wyzanski clearly recognized this possibility in Cape Code Food Products, Inc. v. National Carnberry Association, 119 F. Supp. 242 (D. Mass. 1954), a private antitrust action that resulted in a jury verdict in the amount of $175,000. In fixing a reasonable attorney's fee under Section 4 of the Clayton Act, he stated:

> * * * The rate is the free market price, the figure which a willing, successful client would pay a willing, successful lawyer. Sometimes the figure may seem high. But so far as price is determined by unique excellence and by social usefulness, the advocate is especially worthy of large recompense. His brevity may reflect extraordinary gifts and thus in itself be indicative of merit. * * *And

> his simplicity of presentation may be a proof not of the problem's lack of difficulty, but rather of his unmatched native quality.
>
> * * *
>
> Unless excellence in the trial lawyer is properly recompensed, the best men will not spend their time in court, and thus there will dry up the most essential sources of an independent bar.
>
> Only two countervailing arguments have been advanced (implicity rather than explicity, to be sure) by opposing counsel in the case at bar. The first is that the time spent by plaintiff's counsel in preparation amounted to a total of only 597 hours, and second, that plaintiff's chief counsel has been at the bar only slightly less than seven years. But the very economy of counsel's methods and his youth are perhaps the most significant hall marks of an outstanding talent.

Id. at 244.

The remainder of this memorandum will establish that the award of fees requested by petitioners is fair and reasonable in light of the considerations that traditionally have been deemed relevant by the courts.

The formal petition to which this memorandum is appended outlines in detail the relevant facts concerning two of the considerations typically mentioned by the courts--the time and effort expended and to be expended by counsel[*/] and

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[*/] Affidavit of David Berger, Esq., ¶'s 40-42.

their special expertise*/ in the field of law involved in the action. Thus, no purpose would be served by reviewing these matters herein.

It should be pointed out, however, that petitioners are members of a professional association of limited resources that has been obliged to devote itself to the instant actions for significant periods of time under conditions that have required its professional and non-professional staffs to work numerous nights, weekends, and holidays. In addition, other remunerative professional opportunities have been turned aside in order to discharge the responsibilities petitioners have undertaken by instituting these actions. Somewhat ironically it is petitioners' special expertise as plaintiffs' antitrust lawyers and the pragmatic pressures on it that have resulted in the efficient use of lawyers and paralegal personnel so that the number of hours has been kept within bounds and not been allowed to balloon into the type of formidable totals that are common in attorney fee petitions. These factors, coupled with the highly contingent nature of these actions also have deterred petitioners from incurring expenses in a cavalier fashion, which would burden the class members' recovery in the event of a successful denouement of this litigation. It is submitted that these elements provide an excellent illustration of why the question of what constitutes an appropriate counsel fee requires an analysis of several factors and lends substance to the Fourth Circuit's observation that "charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain." McKittrick v. Gardner, 378 F. 2d 872, 875 (4th Cir. 1967).

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*/ Affidavit of David Berger, Esq., ¶'s 38-39.

C. The Fee Requested By Petitioners Is Fair And Reasonable In Light Of The Success They Have Achieved And The Benefits The Litigation Has Produced For The Class Members

Perhaps the factor given the heaviest emphasis by the courts is whether the attorney has been successful as evidenced by the benefit he has produced for those who stand to gain from the action. See, e.g., Angoff v. Goldfine, 270 F.2d 185 (1st Cir. 1959); Pergament v. Kaiser-Frazer Corp., 224 F.2d 80 (6th Cir. 1955); United States v. Moulton & Powell, 188 F.2d 865 (9th Cir. 1951); Thomas v. Peyser, 118 F.2d 369 (D.C. Cir. 1941) See also O'Hara v. Oakland County, 136 F.2d 152 (6th Cir. 1943); Globus, Inc. v. Jaroff, 279 F. Supp. 807 (S.D.N.Y. 1968); 7A Wright & Miller, Federal Practice and Procedure, §1803. As one member of this court put it recently: "[T]he prime factor in evaluating fee applications for class representatives is the benefit rendered to the class, not merely the number of hours logged." Percodani v. Riker Maxon Corp., 1972 CCH Securities Law Reports ¶93,337 (S.D.N.Y. 1972) [emphasis added]. See also Epstein v. Weiss, 1971 CCH Securities Law Reports ¶92,938 (E.D. La. 1970) ("The crucial factor is success since the court makes an award only when the litigation is successful."); Derdiarian v. Futterman Corp., 254 F. Supp. 617, 620 (S.D.N.Y. 1966) ("The amount of recovery rather than the time spent is the prime factor.") Indeed, in many of the cases a substantial portion of the court's opinion is devoted to defining or measuring the benefit in order to provide a basis for computing the attorney's fee. See e.g., Pergament v. Kaiser-Frazer Corp., supra; Angoff v. Goldfine, supra; In re Continental Vending Machine Corp., 318 F. Supp. 421 (E.D.N.Y. 1970); Zenn v. Anzalone, 46 M.2d 378, 259 N.Y.S.

2d 747 (Sup. Ct. 1965). Not only does the benefit produced provide insight into the quality of the work done and the expertise of counsel but it also sheds considerable light on what constitutes an appropriate level of compensation.

In the instant actions the petitioners have been extraordinarily successful and have benefited the members of the three classes they have represented in significant ways The extent of this can readily be appreciated by examining the terms of the proposed settlement. It calls for the payment of $10,000,000 over a period of approximately four years in the following installments: $2,900,000 upon entry of the final judgment; $2,900,000 plus interest on January 15, 1973; $2,900,000 plus interest on January 15, 1974; $325,000 plus interest on January 15, 1975; and $975,000 plus interest on January 15, 1976. The interest will accrue on the unpaid portion o te Settlement Fund from the date the judgment is entered at the extremely favorable rate of 1% above the prime interest rate. Assuming that a prime rate of 5% prevails throughout the period, the $10,000,000 Settlement Fund will be augmented by interest in the amount of $695,452 for a total monetary recovery for the classes of $10,695,452.*/

There is another facet to the settlement achieved by petitioners that demonstrates their success in conducting this litigation and it is relevant to appraising the benefit they have secured for the class members as well as the value of the services rendered. As a result of petitioners' skillfull negotiating efforts, the distribution of the Settlement Fund will be effected in a manner that is uniquely equitable and shows that great care was expended in assuring the fair treatment of as many of the customers of defendants' services as possible. In the first place, paragraph 2 of Settlement Order No. 1 defines the beneficiary classes in extraordinarily broad terms that embrace virtually anyone who has suffered damage as a result of the antitrust violations alleged in these actions.**/

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*/ The petitioners' request for fees in the amount of 25% does not extend to the interest that will accrue on the unpaid balance of the Settlement Fund between the entry of judgment and January 15, 1976. In reality, therefore, they only seek 23.3% of the money recovered for the classes through this settlement. Moreover, petitioners' fee will be paid in installments and they will not receive all of it until January 15, 1976.

**/ Only instrumentalities of the federal government and residential customers have been omitted from the three classes.

As a result many more claimants will be able to share in the Settlement Fund than otherwise might be the case.

In a related vein, the settlement covers the eleven-year period between 1957 and 1968. Most settlements of private antitrust cases only embrace a four-year period.*/ Because of the significantly greater length of the settlement in the present actions, the number of those who will benefit from it is substantially higher than is typical. Even if the action had gone forward in the face of the risks of a full trial on the merits and defendants' liability had been established, statute of limitation constraints may well have sharply reduced the number of class members who would have benefitted from the action, particularly since there is

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*/ See, e.g., *City of Philadelphia v. Interpace Corp.*, (E.D. Pa. C.A. 43008) (concrete pipe); *City of Philadelphia v. General Host Corp.*, (E.D. Pa. C.A. 68-704) (Bakery Products); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, (E.D. Pa., C.A. 41-774) (plumbing fixtures); *City of Philadelphia v. Morton Salt Co.*, (E.D. Pa. C.A. 33-781) (rock salt); *School District of Philadelphia v. Harper & Row Publishers, Inc.*, (N.D. Ill., C.A. 68 C 2144) (library books); *Regal-Tyson, Inc. v. Globe Ticket Co.*, (E.D. Pa., C.A. 43 221) (tickets). See also *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 47 F.R.D. 557 (E.D. Pa. 1969) (copper pipe, 6 years).

no basis in the existing record for extending the normal treble damage action limitations period by invoking the notion of fraudulent concealment.

Moreover, counsel for at least one of the defendants vehemently asserts that its client did not engage in any untoward conduct after 1961. If that line of defense were pursued, it would pose great difficulties for anyone seeking to recover improper charges during that period. And even those asserting claims for the years 1957 to 1961 either would have to present documentation thereof, an undertaking that would be difficult in many cases because the passage of time may have resulted in a scattering or destruction of the relevant records, or they would have to establish their rights on the basis of the defendants' record, a process that would be slow, uncertain, and expensive. All of these claimants are safely embraced by the settlement negotiated by petitioners.

The quality of the settlement also may be measured by the fact that, in response to the legal notice, class members have interposed 14,079 sworn claims. After all challenges to those claims are resolved, Petitioners estimate that the transactions covered by the settlement will approximate $310,000,000,[*/] a figure that does not exclude federal excise tax. Thus, not only is the settlement figure impressive simply in terms of its dollar amount, one that probably could not have been augmented without undertaking the very substantial risks of further litigation discussed later in this memorandum (see Section E, infra), but it represents, without interest, approximately 3.23% of the dollar amount of the services purchased by the claimants over an 11-1/4 year period,[**/] a percentage that compares very favorably with settlements reached in other private antitrust cases. It is interesting to note that had the settlement period been the normal four rather than 11-1/4 years and the dollar amount of the services purchased and number of claimants been proportionately reduced, the Settlement Fund would represent approximately 9.08% of the cost of the services purchased from defendants by claimants

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[*/] This figure represents a rough estimate of what the final total of acceptable claims will approximate after challenges have been resolved.

[**/] With the 8% excise tax excluded, the total claims would equal approximately $285,200,000 and the recovery would represent 3.51% for 11-1/4 years of transactions or 9.87% of transactions over a 4-year period.

during a four-year period.[*]

Another element that should be taken into account, both in measuring the benefits produced by the petitioners' efforts and in evaluating the fairness of the settlement they have achieved, is that the defendants have been required to bear the expense of notifying the members of the three classes of the pendency of the action and the proposed settlement. This has accomplished two things. First, it has relieved the classes, and therefore the Settlement Fund, of a significant expense item. Second, it has resulted in a notice-giving process of the highest informational quality, employing both first class mail addressed to virtually all of the defendants' current customers and the publication of notice in both the New York Times and the Wall Street Journal (including all regional editions) once a week for three consecutive weeks, with the notice being approximately one-eighth of a page in size. There can be no doubt that the caliber and effectiveness of this notice procedure is directly responsible for the large number of claims--approximately 14,079--that have been made against the fund.

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[*] In the Concrete Pipe and Library Books cases the corresponding figures were approximately 7.1% and 9.2% respectively. In Bakery Products it was 15.7% and in Copper Pipe 18.5%.

Only brief mention will be made at this juncture, since its significance is explored in greater detail later (see Section D, infra), of yet another form of "benefit" produced by petitioners' efforts. That is the benefit to the public achieved through the private enforcement of the antitrust laws in a context that otherwise might have gone unremedied because of the economic realities of the situation and the special hazards of this litigation.

In evaluating the various benefits described above, it must be remembered that they were produced entirely by the professional diligence and foresight of the petitioners. None of the individual actions or state-wide class actions that had been instituted against these defendants, even if successful, would have protected the members of the three classes covered by the agreement now before the court. Indeed, the stark fact is that no one was interested in looking after the members of the three national classes of purchasers of accredited central station protection services other than petitioners who, in order to assert the rights of their clients in the only economically feasible manner available, conceived of instituting and then prosecuted these three national class actions.

In considering this application for fees, it must be remembered that everything that is being recovered in these cases represents a windfall for the thousands of members of the plaintiff classes and a recapturing of improperly obtained profits by the defendants--goals that would have been impossible without Petitioners' efforts.*/ Every dollar that will be distributed to the class is a dollar that they would not have received but for petitioners' ingenuity, expertise,

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*/ The court must remember that defendants are not free to "engage in predatory price practices to the detriment of * * * individual consumers and then claim the freedom to keep their ill-gotten gains which, once lodged in the corporate coffers, are said to become a 'pot of gold' inaccessible to the mulcted consumers because they are many and their individual claims small." In re Antibiotic Antitrust Actions, 333 F.Supp. 278, 282-83 (S.D.N.Y. 1971). See also City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971).

and indefatigable effort. But for counsels' instituting these three class actions prior to the running of the statute of limitations, none of defendants' subscribers who are represented in these cases would have received anything. The fact is that most of the nonparty class members--the many thousands who now so eagerly seek to participate in the settlement petitioners have secured for them--have been sleeping on their right for years.*/ A few of the vigilant customers have taken care of themselves by instituting individual actions. Other major purchasers who knew the facts chose to do nothing, apparently having no stomach for protracted litigation or little faith that it would succeed, or because of other reasons.

Perhaps many of the members of the classes now represented by petitioners have been lethargic because they had no knowledge of their potential rights against the defendants. But even if they did, they probably would have concluded that asserting their rights would not be economically fruitful in light of the cost and uncertainty of doing so. This possibility is clearly demonstrated by the affidavits accompanying this petition. In some cases, no doubt, putative claimants have stayed their hands in order to protect other commercial relationships they may have with the defendants or because it might have rendered them vulnerable to countercharges of violations of the antitrust laws.

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*/ As to windfalls and sleeping beneficiaries, see Blau v. Rayette-Faberge, Inc., 389 F.2d 469, 474 (2d Cir. 1968).

But petitioners and their clients have acted! And in doing so they have benefited everyone in the three classes covered by the proposed settlement, regardless of what motivated their inactivity. It, therefore, seems highly appropriate for any member of those classes to disparage petitioners' efforts, or to object to their request for adequate compensation from a fund that they created for the benefit of all.

D. The Fee Requested By Petitioners Is Fair And Reasonable Because The Institution Of The Actions Now Before The Court For Settlement Was In The Public Interest And Actions Like It Should Be Encouraged

One of the crucial elements, and in some contexts the dominant consideration, in ascertaining a reasonable attorney's fee is whether the action can be said to have furthered the public interest. This factor has been particularly well developed by the federal courts in the securities regulation field. The most significant recent Supreme Court decision on the subject is Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), which was a combined derivative and class action under the Securities Exchange Act of 1934. Plaintiff sought an injunction against defendant's voting certain proxies that allegedly had been obtained by means of a misleading solicitation. The case reached the Supreme Court on an interlocutory appeal that focused on questions of liability and causation. After reinstating the district court's grant of partial summary judgment in favor of the plaintiffs, the Court considered the question of an interim award of litigation expenses and reasonable attorneys' fees. It was not troubled by the fact that the action would not produce a monetary recovery from which the fees could be paid. Rather, the Court focused on the importance of vindicating the policies embedded in the federal statute. It stated:

> In many suits under §14(a), particularly where the violation does not relate to the terms of the transaction for which proxies are solicited, it may be impossible to assign monetary value to the benefit. Nevertheless, the stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders. * * * Whether petitioners are successful in showing a need for significant relief may be a factor in determining whether a further award should later be made. But regardless of the relief granted, private stockholders' actions of this sort "involve corporate therapeutics," and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute. To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expense but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit.

Id. at 396-97.*/ Other cases involving the federal securities acts include the following: de Haas v. Empire Petroleum Company, 435 F.2d 1223 (10th Cir. 1970); Escott v. Barchris

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*/ The Supreme Court's reference to "corporate therapeutics" stems from the important article, Hornstein, Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards, 69 Harv.L.Rev. 658 (1956), which presaged the Supreme Court's recognition of the public interest factor in Mills by stating that "public policy considerations * * * require 'a flavor of generosity.'" Id. at 681.

Construction Corp., 340 F.2d 731 (2d Cir. 1965); *Smolowe v. Delendo Corp.*, 136 F.2d 231 (2d Cir. 1943), certiorari denied, 320 U.S. 751 (1943); *Epstein v. Weiss*, 1971 CCH Securities Law Reports ¶92,938 (E.D. La. 1970); *Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969); *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968). See also *Angoff v. Goldfine*, 270 F.2d 185 (1st Cir. 1959) (derivative suit); *Pergament v. Kaiser-Frazer Corp.*, 224 F.2d 80 (6th Cir. 1955) (derivative suit).

The philosophy articulated by the Supreme Court in *Mills* has been applied in a wide spectrum of situations outside the federal securities acts.[*] For example, *Newman*

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[*] One writer has advocated the broad use of attorney fee awards to encourage private litigation furthering the public interest in a variety of contexts:

> The broader impact of *Mills* lies in its "benefit" language augmented by the simultaneous adoption of the supportive therapeutics principle. "Legal therapeutics" is essentially a restatement of the deterrents theory with the emphasis switched from public to private action. It confronts the problem of prohibitively high litigation costs, and as such need not be limited to corporate finance or stockholder's suits. Hornstein's corporate world
> (Continued)

v. Piggy Park Enterprises, Inc., 390 U.S. 400 (1968), involved a class action to obtain injunctive relief against racial discrimination. In discussing the propriety of awarding attorney's fees the Supreme Court pointed out that the action had been brought under the portion of the Civil Rights Act of 1964 providing for injunctive, rather than damage relief, which made it necessary to provide an incentive so that private citizens and lawyers would use the courts to effectuate the purpose of the statute. According to the Court:

> * * * If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees--not simply

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(Continued)

> */is nothing but a microcosm of the society-wide effects of the traditional rule and if successful litigation to enforce the law makes for a better corporate world, it also makes for a world of viable civil rights, more consumer protection and less air pollution.

Comment, The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co., 38 U.Chi.L.Rev. 316, 329 (1971).

> to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek injunctive relief under Title II.

Id. at 402.

Of course, the Newman case itself involved the application of a statutory right to attorney's fees. However, its philosophy of providing encouragement to private litigants who seek to effectuate public policies has broader scope and has been applied in litigation challenging racial discrimination in situations in which there is no statutory provision for fees. Thus, in Lee v. Southern Home Sites Corp., 444 F. 2d 143 (5th Cir. 1971), a suit under 42 U.S.C. §1982 against a real estate developer who allegedly refused to sell plaintiff a lot because of his race, Judge Wisdom interpreted the Mills principle as "resting heavily" on its acknowledgment of "overriding considerations"--"that private suits are necessary to effectuate congressional policy and that awards of attorney's fees are necessary to encourage private litigants to initiate such suits." Id. at 145. See also Bradley v. School Board of City of Richmond, Virginia, 53 F.R.D. 28 (E.D. Va. 1971) (class action against racial segregation in public schools); Comment, The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co., 38 U. Chi.L.Rev. 316 (1971).*/ Parenthetically, it should be noted that in cases such as *Newman* and *Lee* the attorney's fee is assessed against the defendant, rather than paid out of a fund created by the efforts of plaintiff's counsel as will be true in the instant case.

A number of courts have reinforced the importance of encouraging private litigants to vindicate public wrongs by suggesting that the fees awarded be particularly generous. This point was made by Judge Weinstein in *Dolgow v. Anderson*, 43 F.R.D. 472, 494-95 (E.D.N.Y. 1968), a securities regulation case:

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*/ Two significant state cases in which the importance of awarding counsel fees when no fund is created but a public policy objective is furthered are: *Bosch v. Meeker Cooperative Light & Power Association*, 257 Minn. 362, 101 N.W. 2d 423 (1960) and *Abrams v. Textile Realty Corp.*, 97 N.Y.S. 2d 492 (Sup.Ct. 1949). Both cases are derivative suits challenging allegedly ultra vires corporate acts. In the Minnesota case, the court does require that there also be a "substantial benefit" to the corporation in order to prevent encouraging trivial litigation. In the New York case, however, the allegedly ultra vires act apparently would have benefited the corporation and the security holders.

> In some areas of the law, society is dependent upon "the initiation of lawyers for the assertion of rights" * * * and maintenance of desired standards of conduct. The prospect of handsome compensation is held out as an inducement to encourage lawyers to bring such suits. * * * The instant case presents a classic example of such a lawsuit. Quite obviously, a major incentive to forceful prosecution is the substantial counsel fee plaintiffs' attorney believes he may be awarded if he is successful.

The same point was forcefully put in Smolowe v. Delendo Corp., 136 F.2d 231, 241 (2d Cir. 1943), certiorari denied, 320 U.S. 751 (1943), as follows: "Since in many cases such as this' the possibility of recovering attorney's fees will provide the sole stimulus for the enforcement of §16(b)(of the Securities Exchange Act of 1934), the allowance must not be too niggardly." Similar sentiments were expressed in Murphy v. North American Light & Power Co., 33 F.Supp. 567, 571 (S.D. N.Y. 1940). See also Berland v. Mack, 48 F.R.D. 121, 127 (S.D.N.Y. 1969).

This attitude is not peculiar to securities regulation litigation. For example, in In re Osofsky, 50 F.2d 925 (S.D.N.Y. 1931), a bankruptcy proceeding in which the attorneys had succeeded in producing assets for the estate, the district court analogized their work to salvage at sea and stated:

> In salvage cases courts have wisely come to think that, as a matter of public policy, it is necessary to give such adequate reward to a successful salvor as will make others to whom salvage situations are presented interested in attempting salvage operations. There must always be a flavor of generosity in the awards to success in order that an appetite for effort may be stimulated.
>
> This attitude involves a wise public policy and is as beneficial to ship owners, cargo owners, and underwriters in admiralty law as a similar attitude is to creditors in bankruptcy proceedings.

Id. at 927.

The circumstances in the instant actions are closely analogous to those in Osofsky. The imminent running of the statute of limitations coupled with the practical considerations articulated in the affidavits accompanying this Petition that made it impossible for the members of the class who are represented by petitioners to pursue the defendants on their own, the efforts of petitioners and their clients in these cases certainly can be thought of in terms of the "salvage" metaphor. See also In re Universal Lubricating Systems, Inc., 165 F.2d 664 (3d Cir. 1948); Silver v. Rosenberg, 139 F.2d 1020 (2d Cir. 1944).

The wide applicability of the policy favoring generous compensation to attorneys who promote the public interest is further illustrated by Freeman v. Ryan, 408 F.2d 1204 (D.C. Cir. 1968). In this case the petitioning attorneys were counsel for a class of non-nearby milk producers in an action that succeeded in declaring invalid a nearby differential provision in the New York-New Jersey Milk Order issued under the Agricultural Adjustment Act. The appellate court authorized fees of $185,000, plus out-of-pocket expenses, to be paid from a $550,000 fund created by the litigation--an award of approximately one-third of the amount retrieved. The court did this even though much of the key research has been undertaken by the court itself and the lawyers seeking the award had contributed to the sharp tone of the proceedings. The District of Columbia Court of Appeals justified its action as follows:

> Our objective is to proceed in accordance with equitable principles so as to reward the attorney whose service in stopping an unauthorized payment has been of benefit to the class

> of private persons involved, and to the public interest in observance by administrative and executive officials of statutory limitations on their authority.

Id. at 1206.

All of the foregoing is directly applicable to the actions that provide the backdrop to this petition. It is beyond debate that providing an environment that encourages private antitrust actions such as these is a keystone in the congressional plan for enforcing the statutory proscriptions relating to anti-competitive conduct. Just a few weeks ago, in State of Hawaii v. Standard Oil Co. of California, 40 Law Week 4246, CCH Trade Regulation Reports ¶73,862 (1972), the Supreme Court noted the congressional policy encouraging the work of "private attorneys-general." The Court has spoken in this tone before. See, e.g., Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 502 (1969) ("Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition."); Perma Life Mufflers Inc. v. International Parts Co., 392 U.S. 134, 139 (1968) (characterizing private suits as a "bulwark of antitrust enforcement"); Minnesota Mining & Mfg. Co. v. New Jersey Wood

Finishing Co., 381 U.S. 311, 318-19 (1965) ("Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws").

Later in its opinion in State of Hawaii, the Court made it clear how important both the class action and the availability of attorney's fees are to the execution of the policy promoting private attorneys-general:

> * * * Rule 23 of the Federal Rules of Civil Procedure provides for class actions which may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. * * *The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorney's fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits.

In reality two types of benefit have been produced by the cases before the court. The first, of course, is the benefit represented by the settlement, which will inure to the members of the class. The second is of a more subtle character. It is the benefit to all who currently use defendants' services or who may use them in the future. This group will benefit by defendants' recognition that the course of conduct that gave rise to these class actions can subject them to serious financial liability. Most assuredly the instant actions have provided a significant deterrent to anti-competitive conduct. Taken one step further, the benefits to be derived from this litigation will be realized by all members of the consuming public who are now a scintilla better protected by the antitrust laws. In short, the institution and effective settlement of these cases provides a classic illustration of the wisdom of Congress in relying on private litigation to enforce the antitrust laws.

Accordingly, in arriving at a reasonable fee in the present actions, the court must take account of the fact that petitioners were promoting one of the basic enforcement policies of the nation's antitrust laws. Indeed, it is only through actions such as these that the threat of holding violators of the antitrust laws liable for damages becomes creditable so as to provide the desired deterrent against anti-competitive conduct. Conversely, therapeutic actions of this type become feasible only through the vehicle of the class action and only when there is a reasonable prospect of recovering attorney's fees from the fund created by the litigation for those who successfully perservere. See generally Escott v. Barchris Construction Corp., 340 F.2d 731, 733 (2d Cir. 1965). As the Tenth Circuit has recognized in an analogous context, it is the combined availability of class actions, derivative suits, and awards of attorneys' fees that "allow many small claims to be litigated in the same action, [so that] the overall size of compensatory damages alone may constitute a significant deterrent" to anti-social conduct. de Haas v. Empire Petroleum Co., 435 F.2d 1223, 1231 (10th Cir. 1970).

E. The Fee Requested By Petitioners Is Fair And Reasonable Because Of The Contingent Nature Of Their Compensation, The Special Hazards Of This Litigation, Their Special Competence In Private Antitrust Litigation And The Eminence Of Counsel Who Oppose Them

Numerous federal courts have stated that a highly relevant factor is "the contingent nature of the fees, with the accompanying risk of wasting hours of work, overhead and expenses (for it is clearly established that compensation is awarded only in the event of success) * * *". Angoff v. Goldfine, 270 F.2d 185, 189 (1st Cir. 1959). See also Freeman

v. Ryan, 408 F.2d 1204 (D.C. Cir. 1968); McKittrick v. Gardner, 387 F. 2d 872, 875 (4th Cir. 1967); Powell v. Pennsylvania R.R. Co., 267 F.2d 241, 245 (3d Cir. 1959); Harris v. Chicago Great Western Ry. Co., 197 F.2d 829, 834 (7th Cir. 1952); Epstein v. Weiss, 1971 CCH Securities Law Reports ¶92,938 (E.D. La. 1970); Derdiarian v. Futterman Corp., 254 F. Supp. 617, 620 (S.D.N.Y. 1966); Fox v. Glickman, 253 F. Supp. 1005 (S.D.N.Y. 1966); Perlman v. Feldmann, 160 F. Supp. 310 (D.C. Conn. 1958); Paris v. Metropolitan Life Insurance Co., 94 F. Supp. 356 (S.D.N.Y. 1950).

The reason why the contingency factor is viewed as so relevant was ably stated by Professor Hornstein in his leading article, Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards, 69 Harv.L.Rev. 658 (1956), as follows:

> A lawyer's learning, experience, ability, and eminence enable him to command higher prearranged fees than if he were of lesser repute. But where the work has already been performed on a contingency and crowned with success, fair compensation cannot be cut down because of inexperience. Similarly, the "difficulty" and "time" factors would be important elements in a straight fee evaluation. The lawyer on a contingency, however, may expend considerable

> time urging highly meritorious issues and yet end up with no fee if he does not confer a financial benefit. Where success is a condition precedent to compensation, "hours of time expended" is a nebulous, highly variable standard, of limited significance.

Id. at 660.

The federal courts also have made it clear "that successful counsel retained on a contingent-fee basis is entitled to larger compensation than if he had conducted the litigation for a fixed fee." Sincock v. Obara, 320 F.Supp. 1097, 1102 n. 8 (D.C. Del. 1970). See also Philadelphia Electric Co. v. Anaconda American Brass Co., 47 F.R.D. 557, 559 (E.D. Pa. 1969); Sullivan & Cromwell v. Hudson & Manhattan Corp., New York Law Journal, May 13, 1970, 17-18 (N.Y. Sup.Ct.), affirmed without opinion, 35 A.D. 2d 1084, 316 N.Y.S. 2d 604 (1st Dep't 1970), affirmed without opinion, 29 N.Y. 2d 523, 272 N.E. 2d 572, 324 N.Y.S. 2d 79 (1971). The reason for being particularly generous to a lawyer who has taken a case on a contingent fee basis is a pragmatic one. As was stated in Rolax v. Atlantic Coastline R. Co., 186 F.2d 473 (4th Cir. 1951), an action under the Railway Labor Act by individuals against the railroad and the Brotherhood of Locomotive Firemen and Enginemen to declare an agreement depriving black firemen of seniority rights void:

> * * * The justification here is that plaintiffs of small means have been subjected to discriminatory and oppressive conduct by a powerful labor organization which was required, as bargaining agent, to protect their interests. The vindication of their rights necessarily involves greater expense in the employment of counsel to institute and carry on extended and important litigation than the amount involved to the individual plaintiffs would justify their paying.

Id at 481. Other facets of this theme were exposed by the same court in McKittrick v. Gardner, 378 F.2d 872 (4th Cir. 1967) when it said:

> * * * The effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his clients prevails must take account of the lawyer's risk of receiving nothing for his services. Charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain.

Id. at 875.

The need for a generous award by the court when the attorney is proceeding on a contingent fee basis is especially clear when the economics of the situation require him to prosecute his clients' claims on a class or representative basis, as the accompanying affidavits make clear. As a practical matter, the attorney normally cannot secure a fee agreement from each member of the class prior to bringing suit. In addition to the obvious difficulties of even identifying, let alone communicating with, each member of the group prior to suit, there is a threshold obstacle in the form of the impropriety of engaging in conduct that would be tantamount to the solicitation of clients. Thus, in many instances, the instant actions providing a perfect example, the lawyer must proceed on the basis of the contingent fee arrangement he has been given by some of the class members, whose interest in the fund that may or may not eventually be recovered usually will not be significant enough to provide him with anything even approaching adequate compensation for his efforts. If counsel did not have the prospect of an across-the-board award from the fund produced by his successful efforts, the necessary incentive to assume the role of a private attorney general would be lacking and a major weapon in the antitrust enforcement arsenal would be blunted.

The present situation provides an excellent illustration of why the courts have taken the position that it is appropriate to compensate lawyers who have successfully undertaken to recover or preserve a fund on a contingent fee basis at a level that may exceed what might be deemed an adequate level for an attorney working on a fixed fee or a retainer basis. At the time petitioners decided to prosecute the claims on behalf of the three classes represented by plaintiffs in these actions, the hazards of litigation were extraordinary and the prospect of success uncertain. Ironically, they could not even predict whether these cases would occupy their attention for ten days or for ten years.

From the very beginning petitioners knew that they would be confronted by a number of threshold challenges to the viability of the actions that might cut them off at a very embryonic point in the litigation. First, there was a substantial question whether the applicable statute of limitations barred the claims of the class representatives as well as the class members. This challenge to petitioners' actions came very early in the form of a motion for partial summary judgment that was resolved in favor of the representative plaintiffs and the members of the classes only after a denial of certiorari by the United States Supreme Court, 400 U.S. 828 (1970), following a determination by the district court, 304 F.Supp. 279 (S.D.N.Y. 1969), and the Second Circuit, 426 F.2d 850 (2d Cir. 1970). The limitations issue was both difficult and unique so that the eventual success could not have been predicted with confidence.

Having overcome that initial hurdle, petitioners faced another risk they had anticipated at the time they instituted these actions--a challenge to the right to maintain these cases on a national class action basis under Federal Rule 23. One of the most difficult obstacles petitioners knew they would have to surmount was the argument that the classes defined in their complaints did not qualify under subdivision (b)(3) of the rule. That portion of Federal Rule 23 authorizes a class action when the "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Counsel anticipated that their actions would be challenged by defendants on one or more of the following grounds: (1) that the common issues did not predominate because each member of the three classes had sustained different damages and that these individual issues rendered the class action mechanism inappropriate; (2) that the class action was not "superior to other available methods" because under Rule 23(b)(3)(A) and Rule 23 (b)(3)(B), numerous individual actions already had been instituted, thereby giving color to the argument that class members had a significant interest in controlling the prosecution of separate actions; (3) that the actions did not qualify under Rule 23 (b)(3)(D) because enormous management difficulties would be encountered as a result of the unwieldy number of class members, the lack of cohesion within the classes, and the spectre of individual mini-trials on individual damage issues; and (4) that the claims of the plaintiffs were not "typical" as required by Rule 23(a)(3) in light of the diverse interest within the classes. Counsel also knew that these points would raise difficult interpretive questions under what was then a new and complex federal rule. See generally 7 Wright & Miller, Federal

Practice and Procedure §1753. Thus, it was no surprise that defendants' counsel mounted an across-the-board challenge to petitioners' request for class action treatment under Rule 23(c)(1), accompanied by a 63 page memorandum, a 20 page appendix, and 56 pages of affidavits. In order to meet these issues, petitioners carefully prepared and filed two extensive briefs (totalling 86 pages) together with petitioners' affidavit. And as this Court knows, the class action issues were thoroughly argued and orally presented to the Court.

Another significant hazard faced by petitioners stems from the fact that Section 5 of the Clayton Act only gives the decree in an antitrust action brought by the government prima facie evidentiary effect in another action against the same defendant. Thus, counsel knew that the decree in the government's enforcement action against the defendants in the present actions, United States v. Grinnell Corp., 236 F.Supp. 244 (D.R.I. 1964), vacated and remanded on other grounds, 384 U.S. 563 (1966), hardly provided any assurance of ultimate success on the merits. As this court has recognized, the earlier action would not have any collateral estoppel advantage for the classes now before the court.

United States v. Grinnell Corp., 307 F. Supp. 1097 (S.D.N.Y. 1970).

Counsel also appreciated the fact that the decree in the government's enforcement case may be of limited utility in prosecuting these actions for other reasons. In the first place it only covers the period between 1957 and 1961, whereas the instant actions have sought redress for the period between 1957 and 1968. In that connection counsel for American District Telegraph Company has made it clear that some or all of the defendants will contest any charge of misconduct on their part during the post-1961 period. Moreover, the decree in the Grinnell case is partially based on a theory of predatory practices and the findings in that action would simplify a case brought by defendants' competitors. But in these actions, petitioners represent three classes composed of subscribers, not competitors. Petitioners realized from the outset that they might not receive much sustenance from the government's decree on such questions as the impact of defendants' predatory practices on the market for central station protective services or the damages sustained by members of the class as a result thereof.*/ For example, defendants have stated to the Court that even assuming defendants engaged in improper pricing in certain markets, some members of the classes represented by petitioners actually have benefited thereby.

The petitioners' efforts deserve special approbation and the hazards they have undertaken come into even sharper focus when account is taken of the eminence and the resources of the counsel opposing them. Defendants in these actions are represented by four of the most prestigious law firms in the United States.**/ They have enormous professional, para-professional, and supportive facilities at their disposal and they have used them at every step in this litigation.

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*/ The Department of Justice in its civil suit against the defendants under Section 4A of the Clayton Act (S.D.N.Y., 65 Civil 2486), in which the government's position is that of a user of defendants' services so that it is comparable to the plaintiff classes in these actions, admitted "that issues relating to damages and the causative relationship between the antitrust violations and said damages are issues yet to be litigated and determined." Memorandum in Support of Motion for Partial Summary Judgment. pp. 2,5 (1969).

**/ This court has referred to lead counsel for the defendants in these actions as "recognized as able and experienced counsel." Trans World Airlines, Inc. v. Hughes, 312 F.Supp. 478, 483 (S.D.N.Y. 1970), affirmed, 449 F.2d 51 (2d Cir. 1971) (certiorari granted).

Defendants' counsel have pursued every conceivable line of attack on plaintiffs' cases. As indicated earlier, they have sought partial summary judgment based on a statute of limitations defense and have attempted to abort the proceedings by seeking to have them stripped of their standing as class actions. In addition, defendants' counsel have made it clear that despite the decree in the government's enforcement action they will seek to relitigate the liability of their clients under the antitrust laws and the central questions of what is the relevant market. Furthermore, should these lawsuits not be settled but their class action status upheld, defendants' counsel have made it clear that their defense will be intense and that these cases may continue for many years with great expense to all concerned and continued uncertainty of outcome. There have been intimations, for example, that the defendants' attorneys will seek to challenge the tolling of the statute of limitations with regard to a large number of the class members and that they may find it necessary to depose each of the thousands of claimants. Moreover, it always is open to counsel for defendants to challenge the initial determination that class action treatment is proper by asking the court to amend or alter it, see Rule 23(c)(1), or by moving to strike the allegations concerning representative treatment, see Rule 23(d)(4).

Finally, the particular lawyers handling these actions for the firms representing defendants are among the most seasoned and talented in the nation in antitrust defense work. Some of them already have had years of experience in connection with the antitrust difficulties of the defendant corporations through their involvement in the government's enforcement action, the government's civil action, the competitors' civil actions, and the individual subscriber actions.

In short, when petitioners undertook these class actions on a contingent fee basis there was more than the usual risk that they would never receive any compensation for their services. They knew that the procedural and substantive hurdles were formidable, that their opposite number were among the best in the field and were completely "battle" tested, and that a potentially long and grueling proceeding with the possibility of debilitating expenses and lost professional opportunities lay ahead.

Of course none of this is to be read as suggesting that petitioners were not equal to the task. Counsel for the plaintiffs have considerable standing at the antitrust bar and their abilities have been judicially recognized. Philadelphia Electric Co. v. Anaconda American Brass Co., 47 F.R.D. 557, 559 (E.D. Pa. 1969). As the formal petition indicates (Petition ¶¶37-38), despite its small size petitioners are among the foremost plaintiffs' antitrust counsel in the country. And as the list of cases they have participated in suggests (Petition ¶37), counsel have considerable experience at playing David to someone else's Goliath.

Petitioners have pursued the representation of their clients' interest with vigor and with a minimum of expense. In doing so they also have shouldered the great responsibility of representing thousands of subscribers of central station protective services from all parts of the country reflecting widely diverse aspects of the governmental and business sectors. According to the terms of the settlement agreement, they will continue to bear this responsibility for four more years. Given the hazards that have and continue to face petitioners and the completely contingent character of their right to secure any compensation, their request for a fee to be paid from the Settlement Fund is both fair and reasonable.*/

F. The Fee Requested By Petitioners Is Fair And Reasonable In Light Of The Existing Practices and Judicial Precedents

(1) An Award of 25% of the principal of the Settlement Fund is consistent with what has been allowed in numerous other cases

The amount requested by the petitioners in this fee application seems both fair and reasonable when tested by the existing judicial practices. As already pointed out (see Section B, supra), the dollar amount asked for -- 25% of the

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*/ In *Sullivan & Cromwell v. Hudson & Manhattan Corp*., New York Law Journal, May 13, 1970, 17-18 (N.Y.Sup.Ct.), affirmed without opinion, 35 A.D.2d 1084, 316 N.Y.S.2d 604 (1st Dept. 1970), affirmed without opinion, 29 N.Y.S. 2d 523, 272 N.E. 2d 572, 324 N.Y.S.2d 79 (1971), the court awarded a fee of $3,750,000 which amounted to well over $250 an hour, even though counsel had received payments throughout. The court noted that if the case had been taken on a contingent basis it "would consider as fair and reasonable compensation a fee several times the amount actually awarded or 20 to 25 per cent of the net award."

principal of the Settlement Fund -- represents approximately 23.3% of the benefit recovered for the class, when account is taken of the amount of the Settlement Fund, the interest that will accrue thereon, and the expenses that have successfully been shifted to the defendants. As a result, the fee requested by the petitioners represents less than the amount that petitioners' clients freely contracted to pay them and, in light of the obvious windfall that has been provided the other members of the class, there is no reason why it should not be granted. Certainly there is no reason to discriminate in favor of the absentees by allowing them a greater net recovery than will be available to the plaintiffs. See Philadelphia Elec. Co. v. Anaconda American Brass Co., 47 F.R.D. 557, 559 (E.D. Pa. 1969).

The existing precedents suggest that a fee award representing 25% of a fund created as a result of counsel's efforts is entirely appropriate. Indeed, contingent fee arrangements calling for significantly higher percentage payments have not been challenged under the canons of professional ethics. See generally Strachan Shipping Co. v. Melvin, 327 F.2d 83 (5th Cir. 1964)(40-60%); Gossner v.

Cache Valley Dairy Association, 307 F.Supp. 1090 (D. Utah 1970) (33-1/3%); Steinberg v. Hardy, 93 F.Supp. 873 (D.C. Conn. 1950) (statement that a contingency arrangement calling for a fee between 25% and 50% is fair); Lehigh Valley Dairy R. Co. v. Peaslee, 47 F. Supp. 55 (E.D. Va. 1942).

Moreover, the reports are filled with cases that uphold a judicial award of fees, either after a full trial on the merits or following a settlement, in which the ratio between the fee and the amount recovered is even greater than the one requested by petitioners in this case. One of these cases, Philadelphia Elec. Co. v. Anaconda American Brass Co., 47 F.R.D. 557 (E.D. Pa., 1969), seems to be indistinguishable from the present situation. In that case, the district court approved a settlement of various class actions, including one involving a national governmental class, in the amount of $22,175,000. The court awarded counsel for the class representatives -- petitioners were co-lead counsel -- a fee of 25% of the total settlement sum, together with reimbursement for their litigation expenses of approximately $50,000 and held:

> I have concluded that the 25% figure suggested in this case is reasonable, for the following reasons: (1) The abilities and standing of petitioning counsel are very high. (2) The results achieved were remarkably favorable to the interests of the class members. (3) The enforcement of the antitrust laws in this case was solely due to the efforts of the petitioners, as the statute of limitations would have barred all the claims here involved, but for counsels' enterprise and foresight in filing class actions. (4) The treble-damage feature of antitrust recoveries means that counsel can be generously paid without actual cost to the claimant * * * .*/

Id. at 559. The court also noted:

> The fees sought by the petitioners are undeniably generous, at least when considered in the aggregate. On the other hand, contingent fees in class-actions frequently exceed the percentage suggested, and generally run about 20-25%. Hornstein, "Legal Therapeutics: The 'Salvage' Factor in Counsel Fee Awards," 69 Harv.L.Rev. 658 (1956).

Id. at 559. The instant case is remarkably similar to Philadelphia Elec., even down to the fact that in both actions the amount recovered was by settlement and all of the absent class members' claims would have been barred but for the timely filing of the actions.*/

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*/ It is to be noted that the Philadelphia Elec. case was settled and the recovery in no way represented a trebling of damages.

In addition to Philadelphia Elec., counsel fees of 25% have been awarded plaintiffs' counsel as part of the settlement in the following class action antitrust cases:

A. City of Philadelphia v. Interpace Corp., (E.D. Pa., C.A. 43008) (concrete pipe), settlement of $5,000,000 on behalf of eight statewide governmental classes and one class of private builders situated in the Southern District of New York.

B. City of Philadelphia v. General Host Corp., (E.D. Pa., C.A. 68-704) (bakery products), approximately $500,000 settlement of a class action on behalf of state and local governments and schools in the Philadelphia area.

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*/ The City of New York objected to the fee application in Philadelphia Elec. on the ground that it had par-participated in its own behalf and done considerable work. Nonetheless, the court felt that counsel for the class representatives had been the major factor in producing the fund and concluded that the City of New York was still obliged to pay a 15% fee on its recovery.

C. Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corporation, (E.D. Pa., C.A. 41774) (Settlement Order No. 38 dated November 19, 1971) (plumbing fixtures) settlement of $350,000 for seven statewide governmental class actions.

In a $2,000,000 settlement on behalf of a national class of plumbing and general contractors that was not represented by petitioners, Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 322 F. Supp. 834 (E.D. Pa. 1971), affirmed, F.2d , 1971 CCH Trade Regulation Reports, ¶73,762 (3d Cir. 1971), Judge Harvey (of the District of Maryland, sitting by designation) awarded fees of 25% to the attorneys for the class representatives.*/

It also is significant that petitioners' request for fees is very much in line with the percentages awarded by courts in a variety of other contexts, although counsel acknowledges that there are cases in which lower percentages are used. A recital of a few of the decisions that support petitioners' application provides some useful background. In Freeman v. Ryan, 408 F.2d. 1204 (D.C. Cir. 1968), the appellate court authorized an award of approximately 33-1/3% out of a fund created by counsel's success in an action to declare invalid a milk order under the Agricultural Adjustment Act. In Powell v. Pennsylvania R.R. Co., 267 F.2d. 241 (3rd Cir. 1959), a suit brought by individual employees to effectuate an award the union had obtained against the railroad, the court stated that the attorney was entitled to 30% of the portion of the settlement fund procured through his efforts.

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*/ In the Childrens' library editions cases in the Northern District of Illinois, Judge Decker approved a fee of $195,000 (slightly more than 20%), plus $35,000 in costs, on a recovery in the principal amount of $940,000. The claimants therein were all public bodies.

Derivative suits have produced awards of varying amounts, such as approximately 40%, Perlman v. Feldman, 160 F.Supp. 310 (D.C. Conn. 1958); 30%, Epstein v. Weiss, 1971 CCH Securities Law Reports ¶92,938 (E.D. La. 1970) (Settlement); 22-1/2%, Murphy v. North American Light & Power Co., 33 F.Supp. 567 (S.D.N.Y. 1940); 20% Percodani v. Riker-Maxson Corp., 1972 CCH Securities Law Reports ¶93,337 (S.D.N.Y. 1972) (Settlement); Mardel Securities, Inc. v. Alexandria Gazette Corp., 278 F.Supp. 1010 (E.D. Va. 1967); and 18% Steinberg v. Hardy, 93 F.Supp. 873 (D.C. Conn. 1950) (Settlement). See also Epstein v. Weiss, supra, in which the court recognized: "Removing the exceptional cases, fees in stockholder litigation involving recoveries of amounts comparable to the instant settlement have ranged from approximately 20% to 40% * * * [citing cases]"; Menacher v. Reynolds, Del. Ch. Ct., New Castle County, Civ. Act. No. 1129 (1961) (29% of pretrial settlement).

In the bankruptcy field there have been awards of 30% or more. See, e.g., Jacobowitz v. Double Seven Corp., 378 F.2d 405 (9th Cir. 1967); In re Universal Lubricating Systems, Inc., 165 F.2d 664 (3d Cir. 1948). See also Hammer v. Tuffy 145 F.2d 447 (2d Cir. 1944); Silver v. Rosenberg, 139 F.2d 1020 (2d Cir. 1944); In re Osofsky, 50 F.2d 925 (S.D.N.Y. 1931). In one interesting case, United States v. Anglin & Stephenson, 145 F.2d 622 (10th Cir. 1944), the court allowed a 25% attorneys' fee for the attorneys for Indian wards who were the successful claimants in a proceeding to determine heirship and settle the estate of a full-blooded Creek Indian. And an award in the neighborhood of 37-1/2% was allowed in a compensation case before the War Labor Board. Paris v. Metropolitan Life Insurance Co., 94 F.Supp. 356 (S.D.N.Y. 1950). See also Brunwasser v. Suave, 400 F.2d 600, 602 (4th Cir. 1968) ($800 when fund of $3600 created (22%) said to be a "bare minimum fee" in a tort action).

Finally, brief mention should be made of the practice under Section 4 of the Clayton Act in private treble damage actions, although it must be remembered that attorneys' fees under the statute are assessed as additional damages rather than paid out of a fund created by the efforts of plaintiff's lawyer, as will be true in the present case, and therefore should be less generous. See Noerr Motor Freight Inc. v. Eastern R.R. Presidents Conference, 166 F.Supp. 163, 169 (E.D. Pa. 1958), affirmed, 273 F.2d., 218 (3d Cir. 1959) reversed on other grounds, 365 U.S. 127 (1961) (statement by Judge Holtzoff quoted).[*/] In Cape Cod Food Products Inc. v. National Cranberry Association, 119 F. Supp. 242 (D. Mass. 1954), Judge Wyzanski noted that fees in this class of cases often run substantially more than one-third of the single damage award. This is amply borne out of a very interesting table appearing in Appendix 1 to Judge Gignoux's opinion in Farmington Dowel Products Co. v. Forster Mfg. Co., 297 F. Supp. 924, 931-35 (D.Me. 1969), modified, 421 F.2d 61 (1st

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[*/] In Webster Motor Car Co. v. Packard Motor Car Co., 166 F. Supp. 865,866 (D.D.C. 1955), in awarding attorneys' fees under Section 4 of the Clayton Act, Judge Holtzoff stated: "* * * I might say in passing that in my opinion, the amount that the plaintiffs' counsel is entitled to charge is much larger than the amount I intend to award as the amount to be paid by the defendants."

Cir. 1970), after remand 436 F.2d 699 (1st Cir. 1970), which also indicates a considerable variation in practice. See also Gossner v. Cache Valley Dairy Association, 307 F.Supp. 1090 (D.Utah. 1970) ($42,500 deemed a reasonable attorneys' fee on a $90,000 Robinson-Patman Act Judgment).

(2) The fact that the requested fee is large is not a sufficient reason for reducing it

Of course, the fees being requested by petitioners represent a significant amount of money. But surely the magnitude of the sum involved does not offset the merits of this application, which is evidenced by the benefits petitioners have secured for the members of the classes they represent, the special expertise and competence of petitioners in this field of litigation, the extent of the labors and responsibility they have undertaken and will continue to be burdened with as they administer the distribution of the Settlement Fund during the next four years, and the degree to which they have acted in furtherance of the policies of the antitrust laws.

In any event, large fee awards are not unique in modern litigation. For example, in the famous Hughes Tool litigation, this court held $7,500,000 to be a reasonable fee under Section 4 of the Clayton Act, even though counsel had received regular payments and there was no contingency factor. Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478 (S.D.N.Y. 1970), affirmed 449 F. 2d 51 (2d Cir., 1971) (certiorari granted). In another antitrust case, Philadelphia Elec. Co. v. Anaconda American Brass Co., 47 F.R.D. 557 (E.D. Pa. 1969), discussed above, fees in excess of $4,000,000 were approved to be paid from the settlement. See also Sullivan & Cromwell v. Hudson & Manhattan Corp., New York Law Journal, May 13, 1970, 17-18 (N.Y. Sup. Ct.), affirmed without opinion, 35 A.D. 2d 1084, 316 N.Y.S. 2d 604 (1st Dep't. 1970), affirmed without opinion, 29 N.Y. 2d 523, 272 N.E. 2d 572, 324, N.Y.S. 2d 79 (1971) (fees of $3,750,000 awarded for work performed in a condemnation proceeding even though counsel received periodic payments from his client); Zenn v. Anzalaone, 46 M. 2d 378, 259 N.Y.S. 2d 747 (Sup. Ct. 1965) ($1,876,000 awarded in a major stockholders' derivative action, the court commenting that "unfortunately the precedents permit no award for attorney's 'pain and suffering' in litigation of this character"); City of Philadelphia v. Interpace Corp., (E.D. Pa.

C.A. 43008) ($1,250,000 fees awarded from a settlement fund of $5,000,000). Substantial fees also were awarded in Winkelman v. General Motors Corp., 48 F. Supp. 504 (S.D.N.Y. 1942) ($795,000); and Perlman v. Feldmann, 160 F. Supp. 310 (D.C. Conn. 1958) ($450,000).

Indeed, the complexity and nature of modern litigation is such that it is bound to produce an increasing number of situations in which courts will be called upon to award fees in dollar amounts that are of striking dimensions. Class or representative actions on behalf of hundreds of thousands of litigants against major corporate enterprises will lead to judgments or settlements of great magnitude that have been preceded by a substantial investment of time, energy, and expertise on the part of the attorneys for the successful litigants. In many situations these attorneys will be modest sized partnerships or professional associations, as in the instant case, who have been obliged to devote all or a substantial portion of their resources to meet the exigencies of these elephantine cases and are opposed by defendants represented by powerful law firms who can more easily absorb the burdens of large litigation and have the security of substantial retainer agreements. The demands of these cases on a firm such as petitioners' only can be overcome by working diligently and foregoing other professional opportunities that might stretch its capacities beyond their tolerance. These factors, coupled with the highly contingent nature of the undertaking, strongly suggest that this Court resist any temptation to shave down the fee award because it calls for the payment of a significant dollar amount to petitioners.

Moreover, the court can take judicial notice that the defendants are represented by eminent law firms paid fees on a non-contingent arrangement. The court also may take judicial notice that the fees paid by defendants approximate or exceed the fees requested by petitioners, whose fee is entirely contingent upon the result and the benefits obtained.

(3) The fact that this action was settled rather than adjudicated on the merits does not affect the merits of this petition

Only a paragraph or two need be expended to dispel any notion that petitioners' application should be compromised in any way because this litigation is being terminated by a settlement rather than after a full adjudication of the merits at trial. Settlements are quite common in private antitrust cases. Indeed, it is doubtful whether antitrust enforcement, either by the government or private litigants, would be effective in the absence of the pretrial disposition of a significant number of the instituted actions. Certainly a requirement that a suit be litigated to successful completion as a prerequisite to a fee award probably would discourage prompt settlements. See Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir. 1970), certiorari denied, 398 U.S. 950 (1970).

Moreover, the existing cases make it perfectly clear that an application for counsel fees is in no way prejudiced by the absence of a full dress trial, a judgment on the merits, and the inevitable appeals. Citation of just a few of the antitrust cases to this effect should suffice. Philadelphia Elec. Co. v. Anaconda American Brass Co., 47 F.R.D. 557 (E.D. Pa. 1969); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 322 F. Supp. 834, (E.D.Pa. 1971) affirmed, ____F.2d____, 1971 CCH Trade Regulation Reports ¶73,762 (3d Cir., 1971). In some contexts, federal courts even have awarded attorney's fees when the mere institution of the action appears to have produced the desired results and there has not even been a need for a settlement. See, e.g., Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3d Cir., 1970) (fees awarded even though the class action actually was dismissed on jurisdictional grounds because it seems to have encouraged the union trustees to commence delinquency suits against certain mine operators); Emmet v. Whittier, 164 F.Supp. 563 (D.D.C. 1958) (corrective legislation apparently partially motivated by the institution of a class action to recover amounts withheld from veterans' payments). And in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), attorney's fees were awarded even though it was not yet determined what relief, if any, plaintiffs might secure.

G. Conclusion

In light of the foregoing principles and authorities and in light of the outstanding results achieved in obtaining substantial monetary recoveries for all members of the three national classes in these actions, both those before the Court and those who are absent, all of whose claims otherwise would now be barred, plaintiffs' counsel respectfully submit that their application for an award of fees out of the Settlement

Fund in an amount equal to 25% of the principal of each installment of such fund that is paid by defendants is fair and reasonable under the circumstances and that it would be granted by this Court.

Respectfully submitted,

DAVID BERGER
H. LADDIE MONTAGUE, JR.

DAVID BERGER, P.A.,
ATTORNEYS-AT-LAW
1622 Locust Street
Philadelphia, PA 19103

UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

JAN 23 1970
D. OF

CITY OF DETROIT, et al. : 68 CIV 4026
v. :
GRINNELL CORPORATION, et al. : (E.D. Pa. Civ. 68-1478)

MANHATTAN-WARD, INC., et al. : 68 CIV 4028
v. :
GRINNELL CORPORATION, et al. : (E.D. Pa. Civ. 68-1489)

1225 VINE STREET BUILDING, INC., et al. : 68 CIV 4027
v. :
GRINNELL CORPORATION, et al. : (E.D. Pa. Civ. 68-1479)

AFFIDAVIT RE STATEMENTS OF CLAIM #1

COMMONWEALTH OF PENNSYLVANIA:
:SS:
COUNTY OF PHILADELPHIA :

H. LADDIE MONTAGUE, JR., being duly sworn, deposes and says that I am a member of David Berger, P.A., Attorneys-At-Law, 1622 Locust Street, Philadelphia, Pa., 19103, Counsel for Class Representatives, that I am a member of the Class Action Committee in the above three actions and that I am authorized to make this affidavit on behalf of the entire committee:

1. Submitted herewith as Appendix "A" is a computer print-out that sets forth the name and address of each class member who submitted a sworn statement of claim,*/ the dollar amount of transactions claimed, the dollar amount of transactions challenged (if any), the reason for the challenge and the dollar amount of unchallenged transactions.

2. Submitted herewith as Appendix "B" is a computer print-out setting forth in alphabetical order the name of each class member who submitted a sworn statement of claim,*/ which listing corollates each claimant with its assigned claim number.

3. Appendix "A" sets forth 14,079 number of statements of claim. Of these, 3,216 number have been challenged by the Class Action Committee for one or more of the following reasons:

a. claim filed or postmarked after February 10, 1972;

b. claim not notarized;

c. claimant does not appear to be a member of any class;

d. name of particular defendant (ADT, Holmes and/or AFA) furnishing service not stated;

e. claim does not involve accredited central station protective services;

f. purchases from Grinnell Corporation not includable;

g. claim not specific enough to be reviewed properly;

h. entire claim outside the period, April 13, 1957 through July 13, 1968;

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*/ The computer print-out does not include claims received by affiant on or after April 10, 1972. A listing of these claims is now being compiled and will be submitted under separate cover shortly hereafter and will eventually be added to the computer print-out.

i. a portion of your claim is outside the time period, April 13, 1957 through July 11, 1968;

j. Other.

These challenges are directed against approximately $37,300,362.12 of transactions. Accordingly, approximately $292,298,515.69 of unchallenged transactions are before the Court. For purposes of convenience, the following is a synopsis of the information set forth in Appendix "A".

Number of Claims: 14,079

Total Transactions: $329,598,877.81

Total Transactions Challenged: $37,300,362.12

Total Transactions Unchallenged: $292,298,515.69.

4. Submitted herewith as Appendix "C" is a list of all attorneys who have entered appearances for class members in this litigation. The list is alphabetical by letter and by attorney, but not alphabetical within each letter. Next to each attorney's name and address is the name of the claimant(s) he represents.

5. Submitted herewith as Appendix "D" is a list of all potential class members who timely elected to exclude themselves from these actions. As set forth in the initial Legal Notice, the last date for a class member to exclude itself from these actions was January 26, 1972. The Notice expressly provided: "The postmark on any envelope will determine whether the mailing has been timely."

Additional "exclusions", not listed on Appendix "D" herein, have been mailed to the Clerk after January 26, 1972. These exclusions, by the terms of the Notice, are not valid.

H. LADDIE MONTAGUE, JR.

Sworn to and Subscribed
before me this 1st day
of April 1972.

Alberta C. Newlin
Notary Public

ALBERTA C. NEWLIN
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires April 22, 1972

FUNSTER
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REFERRED TO

NOTICE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Re: Accredited Central Station Protective Services Litigation, 68 CIV 4026, 4027 and 4028

PLEASE TAKE NOTICE that on April 21, 1972, the following documents were filed with the Court:

1. Proposed Plan of Allocation of Settlement Fund:

(a) As of April 10, 1972, 14,079 claims have been filed listing total transactions in the amount of $329,598,877.81. Of those, 3,216 claims, totalling $37,330,362.12 of transactions, have been challenged. Total unchallenged transactions total $292,298,515.69. The overwhelming majority of these transactions include within them an 8% Federal Excise Tax.

(b) It is proposed that the Settlement Fund will be allocated among claimants on an across-the-board pro rata basis, each claimant receiving as a gross recovery the same percentage of its valid transactions.

(c) Based upon the figures set forth in ¶1(a) above, the percentage of gross recovery, exclusive of interest, will range from 3.03% (if all challenges are overruled) to 3.42% (if all challenges are sustained). Inclusive of interest*/, this range will be from 3.26% to 3.67%. This represents claims based on transactions covering an 11 1/4 year period. Any award by the Court of counsel fees and reimbursement of costs will be deducted from this gross recovery.

2. Petition for Award of Counsel Fees and Reimbursement of Costs and Supporting Memorandum:

(a) Counsel for class representatives have requested reimbursement of out-of-pocket costs to date in the amount of

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*/ Interest will be earned on the unpaid portion of the principal Settlement Fund at the prime rate existing from time to time at the Chase Manhattan Bank, New York, New York, plus one point. Assuming the average prime rate during the relevant period is 5%, interest will be earned at a 6% rate or in the amount of $695,452. (Defendants have reserved the right to pre-pay without penalty any or all installments of the Settlement Fund but with interest which has accrued to the date of payment.) In addition, as part of the Settlement, defendants paid for the initial notice, which amount equalled $37,895.

$14,918.73 and for future expenditures.

(b) Counsel for class representatives have requested counsel fees of 25% of the gross principal Settlement Fund, exclusive of interest earned, or total fees in the amount of $2,500,000, to be paid proportionately out of each of the five settlement installments as they become due.

Copies of the above documents are available for inspection on request in the offices of the counsel for the class representatives, David Berger, Esq., David Berger, P.A., Attorneys At Law, 1622 Locust Street, Philadelphia, Pennsylvania 19103 (Telephone: 215-732-8000) and in the Office of The Clerk, United States District Court for the Southern District of New York, Room 601, United States Court House, Foley Square, New York, New York.

CLASS ACTION COMMITTEE

By:____________________

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

CITY OF DETROIT, et al. : 68 CIV. 4026

v.

GRINNELL CORPORATION, et al. : (E.D. PA, CIV. 68-1478)

MANHATTAN-WARD, et al. : 68 CIV. 4028

v.

GRINNELL CORPORATION, et al. : (E.D. PA. CIV. 68-1489)

1225 VINE STREET BUILDING, INC., et al. : 68 CIV. 4027

v. : (E.D. PA. CIV. 68-1479)

GRINNELL CORPORATION, et al. :

-----------------------------------x

NOTICE OF MOTION TO REDUCE LEGAL FEES AND DELAY SETTLEMENT

SIRS:

PLEASE TAKE NOTICE that those members of the "Commercial Class" listed on the attached sheet and referred to in Judge Charles E. Metzner's "Settlement Order No. 1" by their attorneys, Cadwalader, Wickersham & Taft, will move this Court at the United States Court House, Foley Square, New York, New York 10005 in Room 1105 thereof on the 27th day of April, 1972, at 10:30 in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order as follows:

1. Reducing the amount of the legal fees to be awarded to the attorneys for the plaintiff classes; and

2. Staying the settlement of these cases, for the reasons set out in the attached memorandum in support of this motion, in order to allow the plaintiff class members listed

on the attached sheet, time to investigate whether or not the amount of the proposed settlement is reasonable and whether or not plaintiffs could obtain a favorable judgment were the action fully litigated.

CADWALADER, WICKERSHAM & TAFT

By
George D. Reycraft
A Member of the Firm

One Wall Street
New York, New York 10005
Tel.: (212) 425-3000

TO: DAVID BERGER, ESQ.
1622 Locust Street
Philadelphia, Penna. 19103

CAHILL, GORDON, SONNETT, REINDEL & OHL
80 Pine Street
New York, N. Y. 10005

Applicants

Dollar Savings Bank, 2530 Grand Concourse, Bronx, New York 10458

United Mutual Savings Bank, 1370 Avenue of the Americas, New York, New York 10019

The Savings Bank of Baltimore, Baltimore and Charles Street, Baltimore, Maryland 21203

The Seamen's Bank for Savings in the City of New York, 30 Wall Street, New York, New York 10005

Mechanics Savings Bank, 80 Pearl Street, Hartford, Connecticut 06101

Hudson City Savings Bank, 587 Summit Avenue, Jersey City, New Jersey 07306

Peoples' Savings Bank, Main and State Streets, Bridgeport, Connecticut 06602

Western Savings Bank, Broad and Chestnut Streets, Philadelphia, Pennsylvania 19107

The Bowery Savings Bank, 110 East 42nd Street, New York, New York 10017

Germantown Savings Bank, 5458 Germantown Avenue, Philadelphia, Pennsylvania 19144

Springfield Institution for Savings, 1459 Main Street, Springfield, Massachusetts 01101

Dollar Savings Bank, 48th and Smithfield, Pittsburgh, Pennsylvania 15230

The New York Bank for Savings, 280 Park Avenue South, New York, New York 10010

CITY OF DETROIT, et al. : 68 CIV. 4026

v.

GRINNELL CORPORATION, et al. : (E.D.PA. CIV. 68-1478)

MANHATTAN-WARD, INC., et al. : 68 CIV. 4028

v.

GRINNELL CORPORATION, et al. : (E.D.PA. CIV. 68-1489)

1225 VINE STREET BUILDING, INC., et al. : 68 CIV. 4027

v.

v.

GRINNELL CORPORATION, et al. : (E.D.PA. CIV. 68-1479)

PIZITZ, INC., et al. : (N.D.ALA. 67 CIV. 471)

v.

AMERICAN DISTRICT TELEPHONE CO., et al. : (S.D. N.Y. M 19 CIV. 92)

APPLICATION FOR ALLOWANCE OF ATTORNEYS' FEES

Pritchard, McCall & Jones, 831 Frank Nelson Building, Birmingham, Alabama 35203, by Winston B. McCall, partner therein, attorneys for the plaintiffs, Pizitz, Inc., Pizitz of Bessemer, Inc., Pizitz of Roebuck, Inc., and Pizitz of Huntsville, Inc., in Civil Action 67-471, Northern District of Alabama, in accordance with the order of this Court and the settlement of this case, make application for allowance of attorneys' fees for their services in representing the named plaintiffs in this litigation in the amount of Fifteen Thousand One Hundred Fifty ($15,150.00) Dollars plus Two Hundred Fifty ($250.00) Dollars expense, showing to the Court as follows:

1. On June 16, 1967, the firm of Pritchard, McCall & Jones was retained to act as attorneys for Pizitz, Inc., Pizitz of Bessemer, Inc., Pizitz of Roebuck, Inc., and Pizitz of Huntsville, Inc., in connection with their claims against the defendants for damages caused

by defendants' alleged violations of the Clayton Act and of the Sherman Act, with the understanding that their compensation for legal services would be based solely on the amount allowed therefor in the litigation. Said attorneys were instructed to investigate the validity of their claims and to file such legal actions or action as might be protective of their interest. Said attorneys proceeded to investigate the claims and surrounding circumstances and filed complaint against the defendants in the United States District Court for the Northern District of Alabama, Civil Action 67-471, on August 18, 1967. The complaint as filed, together with all court proceedings in this action as contained in the court records, are incorporated by reference and made part hereof.

2. For nearly five years said firm has actively participated in this litigation and in the prosecution of this action. Shortly after the entry of an order by the Judicial Panel on Multidistrict Litigation, filed October 3, 1968, transferring this action to the Southern District of New York primarily for pretrial discovery and proceedings, Pritchard, McCall & Jones associated the firm of Weil, Gotshal & Manges, New York, New York, as local attorney, primarily for purposes of service and forwarding of documents.

3. The said attorneys, as shown in affidavit of Winston B. McCall attached hereto, as Exhibit A and made part hereof, have devoted a total of 202 hours of lawyers' time in the investigation of the claims, preparation and filing of complaint, interviewing potential witnesses, review of records and documents, research, briefs, court appearances, motions, including interrogatories to the defendants and preparing answers to interrogatories of defendants, filing of claims, and related matters leading to the final settlement of plaintiffs' case and to the recovery of damages for the said four plaintiffs as finally approved by the Court. They have also incurred expense in the amount of Two Hundred Fifty ($250.00) Dollars in

duplication of Court documents and proportionate participation therein, and in cost of printing briefs and in long distance calls.

WHEREFORE, petitioners respectfully request that as attorneys for the four above named plaintiffs herein, the firm of Pritchard, McCall & Jones for all legal services to said plaintiffs be awarded a reasonable attorneys' fee in the amount of Fifteen Thousand One Hundred Fifty ($15,150.00) Dollars, plus a reimbursement for expense in the amount of Two Hundred Fifty ($250.00) Dollars.

PRITCHARD, McCALL & JONES
831 Frank Nelson Building
Birmingham, Alabama 35203

By ______________
Partner

CERTIFICATE OF SERVICE

AFFIDAVIT OF WINSTON B. McCALL

STATE OF ALABAMA)

JEFFERSON COUNTY)

I, Winston B. McCall, being duly sworn, on oath depose and say:

1. My name is Winston B. McCall, I am a member of the firm Pritchard, McCall & Jones, Birmingham, Alabama, and have been a member of this firm and its predecessor, Pritchard & McCall, for approximately 25 years last passed. I was admitted to the bar of the State of Alabama during the year 1934 and the bar of the State of New York in 1936. I am a graduate of the University of Alabama, A.B. 1932, and Harvard Law School, LL.B. 1935. I have been a member of the Special Committee on Lawyers' Retirement of the American Bar Association for the last five years. I have been engaged continuously in the practice of law in Alabama, after two years in New York, for over 35 years, except for approximately five years of active service in World War II as an officer in the United States Army. I have handled a number of cases involving the antitrust laws, securities litigation, class action, and derivative stockholders' action.

2. Continuously during the period of nearly five years last passed, I have spent the following time in rendering professional services to the four plaintiffs in the case of Pizitz, Inc., et al. vs. American District Telephone Co., et al., Civil Action 67-471, Northern District of Alabama:

JUNE-DECEMBER 1967

Preliminary conferences with four plaintiffs and witnesses, initial study and research of issues of jurisdiction, the Sherman Act, the Clayton Act, the decision of the Supreme Court of the United States in the case of U. S. v. Grinnell Corp., 384 U.S. 563, securing information from Secretary of State for service of process on defendants.

Preparation and filing of complaint against defendant, Civil Action 67-471, Northern District of Alabama, preparation and filing of affidavit for service of process, securing service, participation in Judge Lynne's Order, September 8, 1967, review of defendants' motion to dismiss and motion to transfer, continuance of hearing set December 1, 1967, on motion docket. 78 Hours

JANUARY-DECEMBER 1968

Interviews with clients and witnesses, continuance of hearing on motion docket of January 5, 1968, review of affidavits of each of defendants and briefs in support of motion to dismiss and motion to transfer, preparation and filing of affidavit in opposition to motion to dismiss and motion to transfer, research and briefs in connection therewith, discussion with and correspondence with the respective Birmingham counsel for each of the defendants regarding settlement negotiations, hearings and oral argument on defendants' motions before Judge Lynne, preparation and filing of motion for permission to add an additional defendant, receipt and study of order to show cause issued by the judicial panel on multidistrict litigation on July 17, 1968, preparation and filing of a response to order to show cause on behalf of the four plaintiffs, study of memorandum and order of the judicial panel on multidistrict litigation transferring the action to the Southern District of New York for coordination and consolidation of pretrial procedures, correspondence with and association of the firm of Weil, Gotshal & Manges of New York as local counsel for plaintiffs in the multidistrict litigation in New York. 37 Hours

JANUARY-DECEMBER 1969

Coordination and correspondence with New York counsel regarding defendants' motion for partial summary judgment related to the issue of the statute of limitations and plaintiffs' motion for pretrial determination of scope of prima facie case, participating in preparation of interrogatories to the defendants, review of plaintiffs' and defendants' briefs for leave to appeal from the order of the United States District Court to the United States Court of Appeals for the Second Circuit, review of answers of Grinnell Corporation to plaintiffs' interrogatories and pretrial stipulations, and review and consideration of other pending motions. 19 Hours

JANUARY-DECEMBER 1970

Review and consideration of Record on Appeal received from the New York Court of Appeals, Second Circuit, January 1970, with particular reference to factual differences in the plaintiffs' cases, review of plaintiffs' motion for production of documents and brief in support thereof, review and consideration of appellants' and appellees' briefs on appeal in the nited States Court of Appeals, including proportionate payment for cost of printing brief on appeal, entry of appearance as counsel for the four plaintiffs in the Supreme Court of the United States on petition for writ of certiorari, correspondence with New York counsel for payment of proportion of duplicating charges for answers to interrogatories, review and suggestions regarding first set of subscriber-plaintiff interrogatories to defendants, preparation and filing of the four plaintiffs' answers to defendants' interrogatories, and conferences with clients with respect thereto, including further reimbursement of New York attorneys for client's proportionate costs. 28 Hours

JANUARY-DECEMBER 1971

Review of answers and objection to interrogatories, correspondence regarding the maintenance and condition of the document depository, settlement negotiations and correspondence with Mr. McInerney, a New York defendant attorney, on behalf of the four plaintiffs, and discussions with clients relating thereto, review of settlement order No. 1 and discussions with clients regarding participation therein. 14 Hours

JANUARY-MARCH 1972

Further review of settlement order No. 1 with clients and decision reached to participate therein, discussions with clients and preparation of sworn statement of claim for each of the four plaintiffs, review with clients of challenge to claim and acceptance of the small reduction, correspondence and telephone calls with New York counsel regarding claim and response and suggestions as to final disposition of this case. 16 Hours

Time spent by Weil, Gotshal & Manges, New York, as local attorney for plaintiffs 10 Hours

TOTAL TIME 202 Hours

3. The firm of Pritchard, McCall & Jones has incurred expense in the amount of Two Hundred Fifty ($250.00) Dollars in this litigation consisting of the cost of duplication of Court documents, proportionate participation therein, and in the cost of printing briefs and in long distance calls.

Winston B. McCall

Sworn to and subscribed before
me this the 11th day of April
1972.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al. v. GRINNELL CORPORATION, et al.	68 Civ. 4026 (E.D. Pa. Civ. 68-1478)
MANHATTAN-WARD, INC., et al. v. GRINNELL CORPORATION, et al.	68 Civ. 4028 (E.D. Pa. Civ. 68-1489)
1225 VINE STREET BUILDING, INC., et al. v. GRINNELL CORPORATION, et al.	68 Civ. 4027 (E.D. Pa. Civ. 68-1479)

APPLICATION OF
WALD, HARKRADER & ROSS
FOR APPORTIONMENT OF COUNSEL FEES

The law firm of Wald, Harkrader & Ross, counsel for the plaintiff in one of the actions formerly consolidated with the captioned cases pursuant to 28 U.S.C. §1407 for coordinated pretrial proceedings, respectfully applies for an order apportioning the fee award herein by granting not less than 10% thereof to Applicant as compensation for its work as principal counsel on the statute-of-limitations litigation in all the pending Central Station Protection Service cases, among which were the above-captioned actions. The Application should be granted for the reasons stated in the Affidavit of Joel F. Hoffman filed herewith.

Respectfully submitted,

WALD, HARKRADER & ROSS

By: /s/
Joel E. Hoffman

1320 Nineteenth Street, N. W.
Washington, D. C. 20036

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al. v. GRINNELL CORPORATION, et al.	68 Civ. 4026 (E.D. Pa. Civ. 68-1478)
MANHATTAN-WARD, INC., et al. v. GRINNELL CORPORATION, et al.	68 Civ. 4028 (E.D. Pa. Civ. 68-1489)
1225 VINE STREET BUILDING, INC., et al. v. GRINNELL CORPORATION, et al.	68 Civ. 4027 (E.D. Pa. Civ. 68-1479)

AFFIDAVIT OF JOEL E. HOFFMAN

CITY OF WASHINGTON)
) SS:
DISTRICT OF COLUMBIA)

JOEL E. HOFFMAN, being duly sworn, deposes and says:

1. This Affidavit is submitted in support of the Application of Wald, Harkrader & Ross (hereafter WH&R) for Apportionment of Counsel Fees. It demonstrates that, by agreement of all plaintiffs' counsel, WH&R successfully performed the principal substantive work on the statute-of-limitations issue for all affected plaintiffs in the consolidated Central Station Protection Service litigation, including the class representatives and members herein, and successfully presented the principal oral argument to the Second Circuit on defendants' interlocutory appeal; that, as Petitioner David Berger, Esq. and the "Troika" applicants all agree, the repulse of defendants' statute-of-limitations motion preserved the viability of these class actions and substantially contributed to the creation of the settlement fund in the size presently before this Court; and that 10% of the total counsel fee award would be just and reasonable compensation for WH&R's services to the class.

2. I am a member of the firm of Wald, Harkrader & Ross, which was counsel for the plaintiffs (competitors of defendant ADT) in Electro-Protective Corp. et al. v. Grinnell Corp. et al., No. 68 Civ. 4629 (D.N.J. Civ. No. 763-68), dismissed per stipulation, Aug. 14, 1970. That action, initially filed in the District of New Jersey, was transferred to this Court on November 14, 1968 by the Judicial Panel on Multidistrict Litigation, to be consolidated with other Central Station Protection Service litigation. Thereafter I actively participated on behalf of WH&R, as counsel for the competitor-plaintiffs in 68 Civ. §4629, in the coordinated pretrial proceedings.[1/]

3. In late June of 1969, WH&R was designated by the caucus of counsel for competitor-plaintiffs to be their representative in the litigation of defendants' statute-of-limitations motion. In that capacity I attended a meeting convened by Weil, Gotshal & Manges to organize the preparation of a brief in opposition to that motion. At the meeting, it was agreed that a single brief should be prepared on behalf of all affected plaintiffs, including the class representatives, except for some few subscriber-plaintiffs in a distinctive position re the statute of limitations who wished to file a separate memorandum. Specifically, it was never suggested by anyone that the issues as to class representatives or members were in any way distinctive or that their interests should be separately presented. To the contrary, Herbert B. Newberg, Esq. (a colleague of David Berger, Esq.) was

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[1/] Although not a member of the bar of this Court, I was authorized to participate by reason of Rule 3 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

designated to prepare a draft brief for all affected plaintiffs, to be reviewed and revised by a committee consisting of Mr. Newberg, representatives of the "Troika", and myself. The next day I sent some comments on defendants' position to Herbert Robinson, Esq. (a member of the "Troika"), who then circulated them to the other members of the committee. I wrote Mr. Robinson again on July 15, 1969 with further comments on defendants' argument.

4. By letter dated July 18, 1969, Mr. Newberg forwarded to me "a draft of a portion of the brief", which I circulated to the other competitor-plaintiffs' counsel. As several of us noted, the Newberg draft inter alia omitted any discussion of a major line of authority supporting plaintiffs which could be relied upon to rebut defendants' motion. This and other difficulties with the draft were discussed by telephone among the revision committee members. It was agreed to cancel the meeting previously planned for July 23 and that an entirely new draft should be prepared by Weil, Gotshal & Manges (also a member of the "Troika"). A few days thereafter I mailed to A. Paul Victor, Esq. of that firm some comments for consideration, including suggested authorities not previously mentioned.

5. Plaintiffs' brief was due August 11, 1969. The draft prepared by Weil, Gotshal & Manges (more than twice the length of Mr. Newberg's) was first made available to other committee members, however, at a meeting on Friday, August 1. At that time it was agreed that yet a third new draft should be prepared, this time by me.

6. On Tuesday, August 5 I circulated a new draft to the members of the committee, requesting them to submit their comments by telephone by the afternoon of August 8. This

draft was newly written almost in its entirety, and also included the fruits of legal research not provided by the prior drafts or their authors.[2] Comments, primarily stylistic and minor in character, were received from committee members Victor, Brett (representing the third "Troika" firm), and Newberg. These were duly noted by me in preparing the final version, which I mailed to Weil, Gotshal & Manges on Thursday, August 8 for reproduction and filing the next Monday.

7. The relative contributions of the statute-of-limitations committee members (the "Troika", Mr. Newberg, and myself) were reflected in the order in which the names of our respective firms appeared on the brief as filed. With the agreement of all, WH&R appeared first, followed by an alphabetical listing of the other participating firms.

8. WH&R played no direct role in the preparation of plaintiffs' papers in opposition (in both this Court and the Second Circuit) to defendants' application under 28 U.S.C. §1292(b) for leave to appeal from this Court's order denying their motion. It should be noted, however, that - as might be expected - the letters and memorandum in opposition drew heavily on plaintiffs' original brief to this Court, and in the case of the Court of Appeals memorandum incorporated significant portions verbatim.

9. After defendants' interlocutory appeal was allowed by this Court and the Court of Appeals, it was agreed by the "Troika", Mr. Newberg, and myself that the appeal brief for plaintiffs-appellees would be drafted by me. The draft was circulated to Weil, Gotshal & Manges representing the affected

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2/ Some of the new research material had been provided by other competitor-plaintiffs' counsel.

subscriber-plaintiffs, and to all competitor-plaintiffs' counsel, on February 13, 1970. Minor comments were received from two of the latter, and longer ones from Mr. Robinson of the "Troika", and from H. Laddie Montague, Esq. (a colleague of Mr. Berger and Mr. Newberg). Mr. Montague's comments were contained in a 5-page letter, while Mr. Robinson's comprised a 5-page suggested revision of a point already made in the draft. The statute-of-limitations committee discussed the draft at a single meeting, and the brief was filed with the Court of Appeals in substantially the form of the draft. The printing was supervised by Weil, Gotshal & Manges, although I too reviewed the galley proofs and provided final editorial corrections.

10. As with the original brief in this Court, the signatures on the Court of Appeals brief were arranged so as to reflect the relative contributions of counsel. WH&R was listed first, followed by Weil, Gotshal & Manges; Mr. Berger's firm; counsel for the subscriber-plaintiffs who had filed a short separate Memorandum in this Court on a separate point affecting only them; the remaining members of the "Troika"; and another firm which had attended the committee's editorial meeting.

11. It was further agreed by all the foregoing firms that the interests of all plaintiffs-appellees would best be served if a single oral argument were presented. I was designated to present the joint argument, calendared by the Court of Appeals for March 26, 1970. Early in March, just prior to the filing of the Brief for Plaintiffs-Appellees, I was advised that Mr. Berger had nevertheless determined to participate in oral argument. During my efforts to contact him to discuss the matter (which took several days),

Mr. Berger wrote to the Court of Appeals Clerk that he intended to appear. He subsequently declined to meet with me so as to attempt a rational division of the argument, although he did promise to refrain from conflict with or duplication of the substance of my presentation and to stress the particular importance to the class representatives and members that this Court's ruling be affirmed.

12. At oral argument in the Court of Appeals I argued all aspects of the case and sought to rebut each of the principal arguments advanced by defendants-appellants. No points were raised by them on brief or at oral argument which were limited to the class representatives and members. Mr. Berger's argument, which followed mine, included no points not previously advanced except for a comment on the favor with which the courts should look on treble damage claims by state and local governmental bodies.

13. The claims of WH&R's clients were settled after the Court of Appeals affirmed this Court's denial of defendants' statute-of-limitations motion, and WH&R therefore did not directly participate in the preparation of the brief in opposition to defendants' certiorari petition. As with the memoranda previously filed by plaintiffs in opposition to allowance of an interlocutory appeal, however, it should be noted that the Supreme Court brief in opposition was also largely drawn from the briefs for which WH&R had primarily been responsible.

14. The important role of the statute-of-limitations proceedings in the creation of the fund before this Court is fully discussed in the papers filed by Counsel for the Class Representatives and by the "Troika", and need not be rehearsed here. Suffice it to observe that, according to

Mr. Berger, the result of defeating defendants' statute-of-limitations motion was not only to "preserve the viability of these lawsuits" (Petition of Counsel for Class Representatives, p. 5) but also to enlarge the damage period almost threefold, from the usual four years to 11 years (Mem. of Counsel for Class Representatives in Support, p. 20). As Mr. Berger has also noted, moreover (id., pp. 45-46):

> "the limitations issue was both difficult and unique, so that the eventual success could not have been predicted with confidence."

The great value of this victory, to which WH&R made the principal contribution, is similarly recognized by the "Troika" (Mem. of Law in Support of Application to Limit and Apportion Counsel Fees, pp. 7-8, and Affidavits in support thereof). Those Affidavits further note not merely that Mr. Berger failed to "materially aid, affect, alter or influence the favorable result" (Stein Aff., ¶10) but that his participation in oral argument was "a matter of surprise and distress" (Robinson Aff., ¶17) and "in some respects * * * disruptive" (Victor Aff., ¶5).

15. Regrettably, it is necessary to dispel some possible inaccurate implications in the papers filed by the "Troika". While the "Troika" (particularly Weil, Gotshal & Manges) did in fact carry a significant administrative burden in coordinating the work assignments on the statute-of-limitations motion and in duplicating, filing and serving the various briefs, the substantive contributions of the "Troika" in the proceedings on that motion were limited in nature. Thus, without deprecating the helpfulness of the "Troika's" review of the drafts prepared by WH&R which became the final products without significant change, or the value of the research memorandum provided by Liebman, Eulav, Robinson & Perlman and the proposed draft prepared by Weil, Gotshal &

Manges, I must respectfully disagree with any suggestion that the "Troika" "played the most significant role" (Stein Aff., ¶6) either in this Court or in the Court of Appeals. For while the "Troika" firms were more active on the statute-of-limitations motion and the subsequent appeal than any other firm representing subscriber plaintiffs (see Victor Aff., ¶5), and while counsel with "the laboring oar regarding this key motion was * * * counsel other than counsel for the * * * class representatives" (ibid.), that laboring oar was borne not by the "Troika" but by WH&R.

16. The time contributed by WH&R to the litigation of the statute-of-limitations motion and appeal on behalf of all affected plaintiffs was in excess of 150 hours. This runs only from the meeting of July 9, 1969 at which I was designated a member of the statute-of-limitations committee, and excludes substantial time expended prior to that date in researching the issue on behalf of WH&R's own clients, but which necessarily contributed to the final written product filed on behalf of all affected plaintiffs, including the class representatives and members.

17. In view of the attention paid in these matters to the experience of counsel, I would note that I graduated from Yale Law School in 1960, when I was admitted to the New York Bar; that I was employed for three years in the Appellate Section of the Antitrust Division of the U. S. Department of Justice, where I briefed and argued numerous antitrust and regulatory agency appeals, and drafted the briefs for the United States to the Supreme Court in several major antitrust cases as well as cases involving novel and complex questions of administrative law; and that I have subsequently practiced with WH&R (since 1968 as a partner) working primarily in

antitrust and litigation matters, on behalf of both plaintiffs and defendants or prospective defendants.

18. The entitlement of counsel in the position of WH&R to share in the fees awarded out of the present settlement fund is established by the authorities set forth in the "Troika's" Memorandum of Law. I believe that, in view of the importance of WH&R's contribution in "preserving the viability of these lawsuits" so as to create the fund, and more particularly in bringing the fund to its present size by reason of trebling the recoverable damage period, a just and reasonable fee would be 10% of the total counsel fee award. Whether this amount should come from the share apportioned to counsel for the class representatives, from the share apportioned to the "Troika" (whose contributions apart from the statute-of-limitations proceedings I do not question), or in part from each, is a matter on which I express no opinion.

And further, deponent saith not.

/s/

Sworn to before me this
day of May, 1972

/s/
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CITY OF DETROIT, et al. :

v. : 68 Civ. 4026
(E.D.Pa. Civ. 68-1478)

GRINNELL CORPORATION, et al. :

v. :

MANHATTAN-WARD, INC., et al. :

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1225 VINE STREET BUILDING, INC., et al. :

v. : 68 Civ. 4027
(E.D.Pa. Civ. 68-1479)

GRINNELL CORPORATION, et al. :

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

A. PAUL VICTOR, being duly sworn, deposes and says:

1. I am a member of the firm, Weil, Gotshal & Manges, one of the three firms appointed as lead counsel by this Court in July 1969 (the "Troika") in connection with all subscriber actions pending before this Court for treble damages against the defendants for antitrust violations in the accredited central station protection service business, including the class actions specifically involved therein. The other firms

constituting the Troika are Parker, Chapin & Flattau and Liebman, Eulau, Robinson & Perlman.

2. My law firm has initiated three individual actions against these same defendants for substantially the same violations of the antitrust laws (68 Civ.2669, 2670 ,2671), and has acted as local counsel with respect
[illegible] CA-67-[illegible]
to two more such actions (67 Civ.2249and 68 Civ. 1479,E.D.Pa). The plaintiffsin two of those actions have decided to remain in the class and to participate in the allocation of the settlement fund (68 Civ. 1479,E.D.Pa and 68 Civ. 2671). My law firm also represents, and has filed appearances on behalf of, seven additional members of the class that are pursuing their claims against defendants through the filing of "Sworn Statements of Claim" pursuant to a Legal Notice from this Court, dated December 13, 1971.

3. This affidavit is submitted as a supplement to the affidavits of Alvin M. Stein and Herbert Robinson, and in support of the relief therein requested. More specifically, this affidavit is submitted in support of the position that the amount of attorney's fees applied for by David Berger, P.A., attorneys for the plaintiffs-class representatives in these cases, is excessive; that the attorney's fees to be awarded in connection with the settlement fund should not be in excess of 20% of the gross fund; and that the Troika should be awarded an amount equal to at least 25% of the amount of attorney's fees actually awarded, as compensation for the work it performed which helped successfully to generate

the settlement fund presently before this Court for approval.

4. Based upon my own personal knowledge, and a review of the records and other documents relating to all of the cases against the defendants at my office, I can state that since the early days of said actions, my law firm has been intimately involved in the efforts of coordinating the activities of all subscriber and competitor plaintiffs (later just subscriber plaintiffs), and of advancing the progress of the lawsuits instituted by all such plaintiffs, including those instituted on behalf of the class. My law firm's activities included those of a substantive and administrative nature which benefitted the progress of all actions of a similar nature. The other members of the Troika (as well as other law firms from time to time) likewise undertook activities on behalf of their own clients or all plaintiffs, which substantially advanced the progress of these lawsuits for all plaintiffs, including the class action plaintiffs. The work done by the Troika (and, from time to time, certain other law firms) redounded to the benefit of the class action plaintiffs and contributed to the successful generation of the settlement fund presently before this Court for approval. I respectfully submit that, without the assistance resulting from the Troika's activities, the class action settlement could not have been achieved in the time period involved, or, at least could not have been achieved without a considerably greater undertaking

by David Berger, P.A.

5. Without fully belaboring the many activities which involved hundreds of hours of time spent by attorney's in my law firm in these cases (considerable detail as to which was set forth in the affidavits of Messrs. Stein and Robinson regarding the Troika's contributions), I will nevertheless set forth below some of the activities performed by my firm that redounded to the benefit of all plaintiffs, including the class action plaintiffs. We:

(a) Assisted in the drafting, revising, preparation and completion of plaintiffs' Rule 34 document request and First Set of Interrogatories, which sought to round out and complete preliminary additional discovery deemed necessary to complement the record and other documents available as a result of the Government's successful antitrust action against defendants;

(b) Agreed, along with Parker, Chapin & Flattau and Liebman, Eulau, Robinson & Perlman, to serve on, and undertake the tremendous responsibilities of, the Troika, which was to act as lead counsel in these cases on behalf of all subscriber plaintiffs, including the class action plaintiffs;

(c) Participated extensively and substantially in the researching, drafting, revising, coordination of counsel, printing and filing, of the various briefs prepared by plaintiffs in opposition to defendants' motion for partial summary judgment based upon the statute of limitations. Unquestionably, all parties to these actions considered the statute of limitations issue to be highly significant regarding the prosecution of these actions. In that connection, I and other persons in my firm, personally participated and expended hundreds of hours in performing the above-mentioned tasks. I believe that the laboring oar regarding this key motion was performed by counsel other than counsel for the plaintiffs - class representatives in these actions. More particularly, for subscriber plaintiffs, the great bulk of the work was performed by the Troika. The work performed by my firm included considerable research regarding the tolling of the statute of limitations under the Clayton Act; assistance in the revision to the draft brief in opposition before the District Court; research, assistance in the drafting and coordination of the opposition to the certification petition filed by defendants; revision to the draft and coordination with respect to the brief in opposition in the Court of Appeals; planning, development and coordination of strategy for purposes of plaintiffs' oral presentation to the Court of Appeals; assistance in the drafting and coordination of the brief in opposition to the Petition for Certiorari; attendance at many conferences to finalize and revise the papers involved. While David Berger, P.A. or its predecessor firm contributed in some respects to the preparation of the aforementioned papers, its role was certainly not major. In fact, in some respects, its role was disruptive of the careful strategy planned by plaintiffs' counsel. For example, after careful deliberation and planning, it was agreed that only one attorney would argue for plaintiffs in the Court of Appeals. Since that attorney represented competitor plaintiffs, it was agreed that one knowledgable representative of the subscriber plaintiffs (Mr. Brett) be at counsel table to ensure that subscriber plaintiffs interests were properly represented. Mr. Berger was not authorized to appear on behalf of subscriber plaintiffs in this coordinated effort.

Mr. Berger nevertheless unexpectedly appeared on the morning of the argument and announced his intention to appear and argue as well. This sudden change in plans and lack of coordination resulted in some trying moments, I am informed, during which time plaintiffs' counsel had to provide Mr. Berger with a subject for presentation to the Court in order to ensure that plaintiffs strategy would not be undermined by Mr. Berger's appearance.

As a result of plaintiffs' success in defending against this motion, the damage period was conclusively extended backward to at least 1957 instead of four years prior to the filing of complaints, as defendants' sought. The success of plaintiffs enabled counsel for the plaintiffs-class representatives to seek recovery for a period of some seven years more than might otherwise have been possible if plaintiffs had failed in their defense against this motion. Plaintiffs' success against this motion materially advanced the negotiating position of David Berger, P.A., and, in my opinion, the size of the settlement fund which the defendants agreed to. The principal work done to achieve this success, and thereby increase the size of the fund, was performed by counsel other than David Berger, P.A., including more particularly, the members of the Troika; and

(d) As a member of the Troika, engaged in continuous coordination activities with respect to the cases of all subscriber plaintiffs, including the class action plaintiffs. In this connection, we circulated materials, answered telephonic and letter communications, planned overall strategy with the other Troika members, and others, attended pre-trial conferences, meetings of subscriber plaintiffs' counsel, etc.

6. In addition to the above activities performed as a member of the Troika, my firm also assisted from the outset to ensure the more effective and efficient prosecution of these cases. Thus, we:

(a) Assisted in the preparation of papers and appeared before the Court in connection with defendants' unsuccessful motion to strike the reference in the complaint of Federated Department Stores (67 Civ.2249) to the decisions of the United States District Court and United States Supreme Court adverse to defendants under the United States antitrust laws on which these private treble damage actions were based;

(b) Attended the session at which the Judicial

Panel on Multidistrict Litigation considered the transference of all of these lawsuits to one court for pretrial discovery purposes;

(c) Participated at the meeting of plaintiffs' counsel in Washington, D. C. on August 7, 1968 at which coordination among said counsel was discussed and established in accordance with the request of the Judicial Panel on Multidistrict Litigation; and

(d) Participated and helped to organize and lead the pre-Troika Steering Committee which then coordinated and directed the work of plaintiffs' counsel, particularly insofar as the organization of discovery was concerned.

7. All of the foregoing was, of course, coupled with our examination of materials and documents in the depository and elsewhere, the knowledge from which enabled us to perform better our function on behalf of the Troika.

8. The foregoing highlights the nature of the activities undertaken by my firm, largely in connection with its responsibilities as a member of the Troika. It is respectfully submitted that this work, and the work of the Troika in general, greatly assisted in advancing the discovery and other progress in these cases to the benefit of all plaintiffs, including class action plaintiffs, and not just those plaintiffs specifically represented by each Troika law firm. Coordination resulted in more effective and efficient discovery, and uniformity in connection with substantive legal issues of interest and importance to all

plaintiffs, such as the statute of limitations matter. Coordination advanced the ability of all plaintiffs to develop their cases more meaningfully, expeditiously and effectively. Coordination was made possible and effective by the Troika's efforts.

9. I respectfully submit that coordination, and the discovery and substantive tasks performed by the Troika, enable the attorneys for the plaintiffs - class representatives to be in the position of negotiating a settlement at an earlier stage of the proceedings than they otherwise could have without exerting considerably more additional time and effort on their own to advance the cases of class action plaintiffs. Moreover, since the individual subscriber plaintiffs were also members of the classes represented by David Berger, P.A., the possibility of these individual plaintiffs not opting out (as in fact occurred, including two which my firm represents) advanced and supported David Berger, P.A.'s ability to negotiate a settlement fund higher than might have otherwise been the case. The work done by the Troika on behalf of its own clients and all subscriber plaintiffs directly contributed to David Berger, P.A.'s ability to negotiate this higher settlement fund at this point in time than would otherwise have been possible, as well as assisted in the successful generation of the fund itself.

10. It is respectfully submitted that counsel fees of 25% of the gross settlement fund would be inappropriate and overly generous in this case. In any

event — in view of the significant contribution made by the Troika and others to the successful generation of the settlement fund, it is respectfully submitted that the Troika should be awarded at least 25% of whatever counsel fees are awarded by the Court in this matter.

A. Paul Victor

A. PAUL VICTOR

Sworn to before me this

8th day of May, 1972.

Anna Marie O'Connor

ANNA MARIE O'CONNOR
NOTARY PUBLIC, State of New York
No. 24-818[illegible]
Qualified in Kings County
Commission Expires March 30, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

CITY OF DETROIT, et al. :

v. : 68 Civ. 4026
(E.D.Pa. Civ. 68-1478)

GRINNELL CORPORATION, et al. :

v. :

MANHATTAN-WARD, INC., et al. :

v. : 68 Civ. 4028
(E.D.Pa. Civ. 68-1489)

GRINNELL CORPORATION, et al. :

1225 VINE STREET BUILDING
INC., et al. :

v. : 68 Civ. 4027
(E.D. Pa. Civ. 68-1479)

GRINNELL CORPORATION, et al. :

-----------------------------------x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

A. Paul Victor, being duly sworn, deposes and says:

This affidavit is submitted to correct an incorrect case number contained on page 2, ¶2, of the affidavit of A. Paul Victor executed on May 8 and filed in support of the "Troika's" application to reduce the counsel fee requested in the above-captioned actions, and to apportion the fee awarded by granting not lessthan 25% thereof to the "Troika." The references to "68 Civ. 1479, E.D. Pa." should be "N.D. Ala. CA 67-471"

A. Paul Victor

A. PAUL VICTOR

Sworn to before me this

12th day of May, 1972.

Anna Marie O'Connor

ANNA MARIE O'CONNOR
NOTARY PUBLIC, State of New York
No. 24-8131425
Qualified in Kings County
Commission Expires March 30, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------x

CITY OF DETROIT, et al. : 68 Civ. 4026

v. : (E.D.Pa. Civ. 68-1478)

GRINNELL CORPORATION, et al. :

MANHATTAN-WARD, INC., et al. : 68 Civ. 4028

v. : (E.D. Pa. Civ. 68-1489)

GRINNELL CORPORATION, et al. :

1225 VINE STREET BUILDING,
INC., et al. :

v. : 68 Civ. 4027
(E.D. Pa. Civ. 68-1479)

GRINNELL CORPORATION, et al. :

-----------------------------x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

A. PAUL VICTOR, being duly sworn, deposes and says:

1. This Affidavit is submitted to correct the statement made in ¶5(c) of the original Affidavit I filed in support of the Troika's position herein, that Mr. Berger "unexpectedly appeared on the morning of the argument and announced his intention to appear and argue as well," and that this was a "sudden change in plans."

2. Exhibits C-6 and C-7 to Mr. Berger's Affidavit in Opposition to Application by Parker, Chapin

& Flattau, et al., For Attorneys Fees establish that Mr. Berger had "requested permission from the court to argue the case on behalf of his own clients" prior to the morning of the argument, and that I had notice of this fact. Most regrettably, copies of these Exhibits were not found in the files of the Grinnell cases at my firm when they were reviewed in connection with the preparation of my original Affidavit. After reading Mr. Berger's Affidavit, I have since ascertained that our files containing these documents had already been placed in storage at an outside warehouse since the statute of limitations phase of the litigation had been completed.

3. I sincerely regret that my recollection with respect to Mr. Berger's prior notification of an intention to argue in the Court of Appeals was erroneous. I had no intention to mislead the Court and respectfully apologize for this error.

A. Paul Victor

A. PAUL VICTOR

Sworn to before me this

24th day of May, 1972

Anna Marie O'Connor

Notary Public

ANNA MARIE O'CONNOR
NOTARY PUBLIC, State of New York
No. 24-8135425
Qualified in Kings County
Commission Expires March 30, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.

v.

GRINNELL CORPORATION, et al.

68 Civ. 4026
(E.D. Pa. Civ. 68-1478)

MANHATTAN-WARD, INC., et al.

v.

GRINNELL CORPORATION, et al.

68 Civ. 4028
(E.D. Pa. Civ. 68-1489)

1225 VINE STREET BUILDING,
INC., et al.

v.

GRINNELL CORPORATION, et al.

68 Civ. 4027
(E.D. Pa. Civ. 68-1479)

AFFIDAVIT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ALVIN M. STEIN, being duly sworn, deposes and say:

1. I am a member of the firm of Parker, Chapin and Flattau, which since June of 1969 has served as liason counsel with respect to all actions pending before this Cou for treble damages brought by subscribers to the central station protection services provided by certain of the defendants. My firm, along with the firms of Liebman, Eula Robinson & Perlman and Weil, Gotshal & Manges, have formed the "Troika" which has acted as lead counsel on behalf of a of these subscriber actions.* These last-mentioned actions are brought under the antitrust laws of the United States a charge *inter alia* that the defendants monopolized the provi ing of accredited central station protective services in th

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*The appointments of lead and liason counsel for all subscriber plaintiffs were made in paragraph 1 of Pre-Trial Order No. 1 of Judge Metzner dated July 2, 1969.

United States. The actions were based in whole or in part o an action entitled United States v. Grinnell Corp. in which reported decisions were entered by the United States Distric Court for the District of Rhode Island, 236 F. Supp. 244 (D. R.I. 1964), and the United States Supreme Court, 384 U.S. 56 A subsequent unreported decree was entered in the District of Rhode Island. Included within the actions on whose behal we have acted are the above-captioned class actions, the settlement of which is presently before the Court. The within affidavit is submitted in support of an application t award (i) total counsel fees in the above-captioned class actions, in a sum which does not exceed 20% of the gross settlement approved by this Court and (ii) the Troika an amount which is not less than 25% of the amount ultimately awarded as total counsel fees herein. It is the gravamen of this application, that it is here appropriate to limit the total counsel fees awarded and apportion them in the light o the facts more particularly shown below and in the other affidavits and memoranda submitted in support of this application since it is clear beyond cavil that:

(a) The activities of the Troika have conferred substantial benefits upon the class and made possible the settlement reached in the amount presently before the Court;

(b) Counsel of record for the class actions (hereafter referred to as "Petitioner") has been able to limit their activities in the prosecution of the actions an rely upon the Troika;

(c) The diligence and initiative which spurred th private enforcement of the antitrust laws is not attributabl to Petitioner but rather to the Troika;

(d) Fairness and equity do not justify depriving the members of the class* of $2,500,000 or of awarding the entire sum determined to be an appropriate counsel fee to attorneys whose activities were not the most significant in creating the fund.

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*My firm and each of the other firms in the Troika represen claimants which have filed proofs of claim in the class.

2. The above-captioned class actions are but thr of the approximately 65 actions brought on behalf of companies which subscribed to the central station protection services provided by the defendants ADT, Holmes Electric Protective Services and Automatic Fire Alarm. By order dat October 2, 1968, the Judicial Panel on Multidistrict litigation ordered that all but two cases brought against these defendants and the Grinnell Corporation which were pending various District Courts were to be assigned to the Honorabl Judge Charles M. Metzner of the Southern District of New Yo pursuant to 28 U.S.C. §1407.* In addition to the cases brought by subscribers, there were transferred to this Cour certain additional actions brought by competitors of the above defendants. The approximately 80 actions which were pending in the Southern District of New York as a result of either their commencement in that Court or the action of th Judicial Panel on Multidistrict Litigation were all assigne to Judge Metzner for all pretrial proceedings and, pursuant to Rule 2 of the General Rules of this Court, for all proceedings with respect to the actions commenced in the Southern District of New York.

BACKGROUND OF THE TROIKA AND REQUESTS FOR COMPENSATION

3. It was apparent from the outset of these proceedings in 1958 that the multiplicity of counsel and complexities of these cases would present administrative and substantive problems. Similarly from the outset, several counsel have been the principal moving forces in seeking to

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*Certain cases not transferred were allowed to proceed in the Eastern District of Pennsylvania because of this advanced state of prosecution.

advance the cases brought on behalf of the subscribers and to bring about a favorable result for the subscribers as early as possible. Your deponent and other attorneys of my firm have been a significant force in promoting whatever progress has been made on behalf of the subscriber actions. In early 1968, my firm was among the counsel who presented briefs and oral argument to Judge Cooper in successfully opposing the defendants' motion pursuant to Rule 12(f) at an early stage in these proceedings. As will be apparent from the affidavits of Herbert Robinson and A. Paul Victor submitted in support of this application, the other firms constituting the Troika were also playing significant roles on behalf of the subscribers at this point in the actions. Wh a stay of proceedings was entered in these actions by order of Chief Judge Sugarman, my firm played a significant role in limiting the effect of the stay so as to minimize the delay which it necessarily caused in the progress of the actions. An attorney of your deponent's firm was designated at a meeting of plaintiffs' counsel to appear before the Judicial Panel on Multidistrict Litigation to be the single spokesman for the subscriber plaintiffs requested by the Panel.

4. Subsequent to the assignment of these cases t Judge Metzner, a pretrial conference was called by the Cour for June 17, 1969. In anticipation thereof, the Court directed that there be designated lead or liason counsel fo the two groups of plaintiffs involved to facilitate the advancement of these cases. (Transcript of hearing in Unit States v. Grinnell et al. dated June 17, 1969, page 6; Attached hereto as Exhibit 1 are pages 6-9 of that transcript) On that date, the Court was advised that at a meet among counsel for the various subscriber plaintiffs, it had

been determined that lead counsel would consist of your deponent's firm, Parker, Chapin and Flattau, and the firms of Liebman, Eulau, Robinson & Perlman and Weil, Gotshal and Manges. (Transcript, pages 6-9) Your deponent's firm was thereafter designated to serve as the single firm among the Troika through which the Court or others could direct communications to all plaintiffs' counsel. Included among the actions on whose behalf the Troika was serving were the within class actions. These roles were memorialized in Pretrial Order No. 1 dated July 2, 1969, paragraph 1.

5. Even prior to the formalization of the appointment, it had become apparent that the three firms which woul constitute the Troika would carry the laboring oar in prosecuting the actions. The order of July 2, 1969 served to formally add substantial administrative responsibilities to the substantive activities already thrust upon us. The Troika quickly recognized the dimensions and nature of the task and have from the outset advised all subscribers' counsel that we believe it appropriate that we be compensate by subscriber plaintiffs or their counsel for our activities on behalf of the entire group. Your deponent verily believe that counsel of record for the within class actions were present on various occasions when these requests were put forward and at least tacitly, if not more affirmatively, consented to our request. Various proposals with respect to computing and determining the appropriate compensation were reviewed and discussed but no precise formula was determined or agreement reached. Indeed the minutes of a pretrial conference of December 3, 1969 in Allied Stores, et al. v. Grinnell demonstrate that compensation for lead and liason counsel was contemplated by the Court and counsel from the outset of these proceedings. (Tr., pp. 5-12)

6. There is set forth below a partial summary of the areas in which the work of the Troika was particularly significant in generating the fund presently before the Court for approval. With respect to the initiation and prosecution of the discovery application which were the most significant factors in the progress of these cases, it was the Troika that was responsible. Similarly, the Troika played the most significant role on behalf of subscribers in opposing the defendants' motion for summary judgment based on the statute of limitations. In these and other respects the Troika was far more responsible for the result reached than was Petitioner.

DISCOVERY

7. The service of detailed interrogatories and requests for the production of documents has resulted in the availability to the subscriber plaintiffs of much of the material necessary for the trial preparation which advanced these cases to the point at which the agreement for settlement of the class actions was reached. As is set forth in greater detail below, the Troika was primarily responsible for the development, preparation, review and compliance with the subscriber plaintiffs' discovery. Indeed, subsequent to the service of our discovery requests, my firm has been instrumental in bringing about such compliance with our requests as has been received by repeated requests to opposing counsel and several applications to the Court. A review of the records of my firm reveals that we commenced work on the preparation of interrogatories in November of 1968. During the following months, well over 100 hours were spent by attorneys in my office in connection with the preparation of the interrogatories served on behalf of all subscriber plaintiffs on the defendants. The interrogatories as finally

filed were completed and served by my office after being signed by your deponent on behalf of all subscriber actions. Our activities in connection with the interrogatories included investigations of law; preparation of various draft of interrogatories; circulating various drafts; receiving comments from numerous persons; coordination and discussion of all of these comments; organization and conduct of meetings to review approaches to discovery; preparation for and attendance at meetings with defendants' counsel to review and revise outstanding discovery pursuant to direction of the Court and Rule 9 of the General Rules of this Court; circulation and reviews of responses; written and oral applications to the Court to compel compliance and numerous related activities. These efforts involved extensive relate administrative activity and the advancement of substantial sums for duplicating, postage and other related expenses. In addition, through this period many additional hours were expended performing similar functions with respect to the preparation of a request for a production of documents pursuant to Rule 34. These discovery applications were served in all actions brought by subscribers (except the United States of America), including the class actions, and resulte directly in the availability to the plaintiffs of the facts and documentary evidence which has made possible considerabl trial preparation of these cases and the progress of the actions which facilitated the settlement of the class action In addition, your deponent's firm spent approximately 75 hours in successfully opposing on behalf of all subscribers, including the class actions, an application brought by the defendant Automatic Fire Alarm with respect to our discovery requests. In connection with that application, we undertook investigation of law with respect to the discovery application, collection and review of documentary materials eventually submitted to the Court in opposition to the motion; preparation of affidavits and legal memoranda; circulation of proposed submissions on the application; and discussion and integration of comments received. In fact, and contrary to paragraphs 6-8 of the Petition in Support of Fees sworn to the 20th day of April, 1972 (hereinafter referred to as the Petition), the discovery application so served was not a joint filing by subscribers and competitors but was served solely on behalf of subscribers.* Accordingly, an even heavier burden fell on the Troika than would appear from the Petition since we were not aided by competitors' lead counsel at this point in the proceedings.

STATUTE OF LIMITATIONS

8. In the summer of 1969, the defendants moved for partial summary judgment based upon the statute of limitations in many of the subscriber actions. As is recognized by Petitioner in paragraph 9 of the Petition, the determination on this application was critical to the class actions. The favorable result considerably broadened the applicable period for which damages could be secured by members of the class. Had we not prevailed, recovery in the class actions could have been limited to the four years immediately preceding the filing of the complaints in July of 1968 rather than at least an eleven year period beginning in 1957. In July and August of 1969, your deponent's firm was one of those principally involved in the substantive and administrative activity involved in preparing the papers in opposition to the motion which were eventually submitted on behalf of the plaintiffs. In that connection, our activities included the attendance at preliminary discussions relating to the

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*As noted, the interrogatories filed herein are signed by your deponent as a member of the firm of Parker, Chapin and Flattau on behalf of all subscribers except the United States of America.

motion; investigations of law and reviews of various authorities; participation in the preparation of drafts of the affidavit in opposition submitted on behalf of the plaintiff circulation of various documents and receipt and analysis of comments; numerous reviews of drafts and participations in numerous conferences revising and refining the drafts which resulted in the brief submitted to the District Court on the application. The end product in the District Court was the result of drafts and documents prepared by numerous counsel which were finally pulled together into a working draft whic formed the basis of our memorandum.

9. Subsequent to the favorable determination in the District Court, your deponent's firm principally prepare the order and submission in support thereof presented to the District Court in connection with the determination. The Petition in paragraph 9(c) incorrectly states that the Court "*sua sponte*, certified for appeal...its interlocutory order denying summary judgment." In fact, the question of certification was argued by both sides and extensively discussed among all counsel who were directly involved in the substantive aspects of the matter. The submission in opposition wa basically prepared and sent by my firm. Attached hereto as Exhibits 2 and 3 respectively are the submissions in support of and in opposition to certification. Here again, Petitioner's participation was not significant in contrast to the role of the Troika. In connection with opposing certification, my firm engages investigations of law and drafting efforts as well as various conferences and circulating documents.

10. In successfully opposing the appeal of the defendants to the Court of Appeals, your deponent's firm and the Troika again played the lead role in the preparation of

the appellees' (including the Class Actions) memorandum and oral argument. It is particularly significant in this regard to note that Petitioner disengenuously asserts he "argued the case in the Court of Appeals on behalf of the three above-captioned class actions and for others.", while noting that "One counsel for certain competitor plaintiffs also presented oral argument." (Petition, paragraph 9(c)) In fact, the various counsel (not including Petitioner) who spent long hours in preparing the presentation on behalf of the plaintiffs had spent considerable time discussing the most effective manner of presenting our oral argument to the Court. David Berger who would depict himself as the principal oral advocate for subscribers never attended any of the conferences relating thereto. These conferences and discussions resulted in unanimity on the form and content of our most effective uniform presentation after a thorough review of the various substantive problems which could arise. In addition, it was unanimously determined that it would be mos effective for a single oral presentation to be made on behal of the appellees. After considerable discussion, all of the firms involved agreed that in seeking to achieve the end of most effective oral presentation, a single counsel, Joel E. Hoffman, Esq., of Washington, D.C. representing a competitor would present the oral argument on behalf of the appellees. All counsel further agreed that Barry J. Brett of my firm, as the counsel most familiar with the matter among subscribe counsel, would be present at the counsel table during the argument to assist Mr. Hoffman and to represent any possible diverse interests of subscribers which arose during the course of the argument. All subscriber counsel, including Petitioner, knew or should have known of this arrangement and apparently acquiesced therein in accord with the apparen uniform objective of securing the best possible results. Notwithstanding the foregoing, on the morning of the argume in the Court of Appeals for the Second Circuit, the involved counsel were advised for the first time that David Berger proposed to address the Court of Appeals which he in fact d This eleventh hour announcement and participation was not based upon or consistent with the long hours of preparation by many counsel who were intimately involved and familiar with the case and did not materially aid, affect, alter or influence the favorable result which we secured in the Cour of Appeals.

11. Thereafter, attorneys of your deponent's fir prepared the initial draft of our successful brief in opposition to the defendants' application to the Supreme Court fo a Writ of Certiorari. We spent additional hours and attend conferences in reviewing and revising the draft and accommodating various counsel. The burden fell even heavier on th Troika at this point since we no longer were aided by certa of the competitors' counsel who had participated extensivel in the District Court and Court of Appeals. Hundreds of hours were expended by your deponent's law firm in connecti with the various substantive and administrative activities incident to the successful opposition to the defendants' motion for partial summary judgment based upon the statute of limitations.

MOTION WITH RESPECT TO AFA

12. Another substantive matter which required a presentation on behalf of the plaintiffs was the response t the motion made by the defendant Automatic Fire Alarm based upon its change of name and corporate status. Here again t plaintiffs prevailed after many hours of work. As a result of coordination principally precipitated by your deponent's

firm, a uniform presentation and motion was made on behalf all subscriber plaintiffs. In paragraph 10 of the Petition it is urged that Petitioner was somehow responsible for this result. In fact, a considerable part (if not all) of the efforts expended by Petitioner was redundant of efforts performed on behalf of the class as a group and motion papers filed on behalf of all subscriber plaintiffs. Indeed, subsequent to the filing of the motion papers by Petitioner, the Court advised your deponent's firm that we should thereafter assiduously seek to avoid the submission of repetitiou papers since the presentation made by Petitioner merely adde to the Court's burden of analyzing the submission. The Cour later described these additional burdens imposed as being "deluged with a bunch of mimeographed papers, and I was sent four sets of motions, none of which had to be made." (Transcript of December 3, 1969, pp. 5 and 18) Your deponen verily believes that these mimeographed papers are those which Petitioner refers in Paragraph 10 of the Petition as their "Motion To Amend."

13. In addition to the specific matters referred to above in which the activities of the Troika were of at least equal benefit to the class as those of Petitioner, although relied on by Petitioner in their application for a fee, we have performed numerous other services and functions which were of significant benefit to the class and aided in bringing about the settlement here reached. Perhaps most significant in this regard is our expertise and familiarity with the actions which facilitated the progress made. The members of the Troika were among those counsel which had promptly addressed themselves to the issues and problems her present and thereby provided the knowledge which has been critical in the making of our substantive decisions and

strategy. (See Affidavit of Herbert Robinson which demonstrates the stage of the proceedings prior to the commencement of the Class Actions by Petitioner and the manner of preparation of the Complaints therein.) Accordingly, our activities included the continual coordination and initiation of steps taken to protect the interests of all subscriber plaintiffs including the class action plaintiffs. We have regularly and assiduously sought to bring about the complete response to our discovery requests. This has entailed considerable administrative and substantive activity and the advancement of large sums in disbursements. We have regularly circulated communications from other plaintiffs' counsel, from defendants' counsel and from the Court and prepared draft and final presentations to the Court and other counsel. On each occasion when a pretrial conference was held before the Court, the principal representative for all subscriber actions (including the class actions) was from the Troika and this has necessitated extensive preparation for each conference. Each conference among plaintiffs' counsel was initiated by and conducted by a member of the Troika, which again involved extensive preparation. Both before and after the class action settlement, we have been the recipient of frequent inquiries from plaintiffs' counsel as to matters relating to the actions in general and the class actions in particular. In fact, we have received and responded to questions from numerous plaintiffs' counsel with respect to aspects of the class action settlement when inquiries to Petitioner were reportedly unavailing.

CONCLUSION

14. While none of the members of the Troika played any direct role in the preparation or presentation of the

papers submitted to the Court in support of a determination that the class actions were appropriately brought or in the negotiation of the settlement heretofore arrived at, we have from the initiation of the litigation been intimately involved with the prosecution of the subscriber plaintiffs' actions. Our activities were critical in bringing about the favorable decisions and the discovery without which the class action settlements could not have been reached in the amount presently before the Court. It is therefore submitted that it would be fair and equitable that the Troika be compensated out of the amount awarded by this Court as total counsel fees. Accordingly, we respectfully urge that the Court take the facts and circumstances above stated into account in determining the fee to be awarded and determine that (i) not more than 20% of the gross settlement would be an adequate attorneys' fee and (ii) the Troika should receive an award of at least 25% of the total amount awarded as counsel fees for their efforts in helping to generate the fund.

WHEREFORE, your deponent respectfully urges that the Court enter an order which would (i) award as total counsel fees in the within actions a sum not in excess of 20% of the gross settlement and (ii) award to the firms of Liebman, Eulau, Robinson & Perlman, Parker, Chapin and Flattau and Weil, Gotshal & Manges a sum of not less than 25% of the total amount so awarded as counsel fees.

ALVIN M. STEIN

Sworn to before me this
8th day of May, 1972.
Donna M. White

DONNA M. WHITE
Notary Public, State of New York
No. 24-41[illegible]
Qualified in Kings County
Term Expires March 30, 1973

EXHIBIT 1

THE COURT: Before we start, I would like to advise counsel that when they address the Court, to please announce your name so the reporter will know who is speaking and so we'll have a record with some meaning.

I understand we have all the appearances.

I requested that counsel for the plaintiffs meet yesterday to see if they could agree upon lead counsel, or liaison counsel as it is sometimes referred to, and I wonder if any agreement has been reached upon that.

MR. MILLSTEIN: Your Honor, I am Mr. Millstein of Weil, Gotshal & Manges. We represent, in this case, Federated Department Stores, J. C. Penney, [illegible]. We have had several meetings in our offices to discuss this problem, and yesterday we came up with a tentative solution which we hope will suit the Court's idea as to what should be accomplished.

We have agreed that we would try to operate as a troika in this arrangement with two other law firms. The reason for that, Your Honor, is that there are a great many plaintiffs' counsel in this case. I think the weight of the jg

work should be distributed among three law firms rather than one, and our experience in other 1407 litigation indicates that undertaking the obligation of liaison counsel is a serious undertaking that may involve a considerable amount of work.

So, rather than designating one law firm to do the entire job, we would like to urge upon your Honor the idea that our firm plus Mr. Norbert Robinson of Liebman, Eulau, Robinson & Perlman, who represent Allied Stores, City Stores, Zale, W. T. Grant, Zayre and Grand Union, plus the Parker, Chapin & Flattau firm, represented this morning by Mr. Broth, who represents Spartan Industries, Russ Togs, Interstate Department Stores and a number of other plaintiffs, all subscriber plaintiffs incidentally, your Honor, would act as the three law firms who together will be liaison counsel. We would like to distribute the work among ourselves.

The way we visualize it, it would run something like this: We will divide among ourselves from time to time the task of appearing before your Honor on motions and other matters. Perhaps one time, this morning for example, we would like Mr. Brott to carry the laboring oar for the matters of housekeeping and other matters before your Honor, the next time perhaps Mr. Victor of my office or myself, and the next time Mr. Robinson. We would like to divide the work among the three of us. In addition, we visualize sub-contracting out some of the work to other plaintiffs' counsel from time to time.

That leaves the question of who your Honor would want to contact. I take it you would want one law firm to watch for notices and to get materials out. We are not altogether in agreement on that, but we recognize your Honor's desire in this regard.

THE COURT: I suggest the troika meet after this hearing and have a ballot and let me know as to who draws the short straw.

I think it is a good idea, actually. It is starting out as a complicated, involved litigation, and I don't see how one law firm could possibly carry the burden, and I'll accept that proposal, with your firm, Mr. Robinson's firm and Mr. Brott's firm representing the subscriber plaintiffs.

MR. MILSTEIN: Yes, your Honor. And then we'll contact your Honor and tell you which one of us will be the firm to contact for liaison directly with the Court.

THE COURT: Now we have some consumer cases.

MR. KELLY: Competitor cases. My name is William Kelly, and I have been selected as the liaison counsel by all of the competitor plaintiffs.

THE COURT: What firm are you from?

MR. KELLY: Casey, Lane & Mittendorf.

THE COURT: I would suggest that counsel select one of the cases, if you have a matter affecting all of them, and make that the same one for all proceedings as we go along so that we don't have papers filed in case A and, a month or two later, papers filed under the title of case B if they deal with all the subscribers or with all the competitors.

So, if you select one of the cases which you let me know will be the case that will represent all subscribers or the case that will represent

EXHIBIT 2

CAHILL, GORDON, SONNETT, REINDEL & OHL
EIGHTY PINE STREET
NEW YORK, N.Y. 10005
TELEPHONE 212-944-7400

HAROLD F. REINDEL
JOHN P. OHL
CHARLES F. DETMAR, JR.
LAWRENCE J. MCKAY
F. ARNOLD DAUM
JERROLD G. VAN CISE
IRWIN SCHNEIDERMAN
DON B. STOOKEY
CLIFFORD L. PORTER
JOHN M. RICHARDSON
O. CARLYSLE MCCANDLESS
DANIEL JAMES
OLIVER M. HAVENS
DUDLEY B. TENNEY
WILLIAM E. HEGARTY
DENIS G. MCINERNEY
WILLIAM M. SAYRE
RAYMOND L. FALLS, JR.
IMMANUEL KOHN

ARTHUR MERMIN
RALPH O. WINGER
JEROME DOYLE
PAUL H. FOX
DAVID INGRAHAM
J. BERNARD QUIGLEY
LOFTUS E. BECKER
WILLIAM T. LIFLAND
WALTER C. CLIFF
JOSEPH P. CONWAY
DAVID R. HYDE
RALPH C. MENAPACE, JR.
MARSHALL H. COX, JR.
THOMAS F. CURNIN
EDWARD A. HANSEN
H. RICHARD SCHUMACHER
JOHN R. YOUNG
WILLIAM L. DENNIS

EDWARD HIDALGO
PARIS, FRANCE
DONALD J. MULVIHILL
WASHINGTON, D.C.

PAUL W. WILLIAMS
FREDRICK C. KEMPNER
COUNSEL
HURLOW M. GORDON
JAMES A. FOWLER, JR.
OF COUNSEL

WASHINGTON OFFICE
FEDERAL BAR BUILDING WEST
1819 H STREET, N.W.
WASHINGTON, D.C. 20006

EUROPEAN OFFICE
4, PLACE DE LA CONCORDE
PARIS, FRANCE

RADIO AND CABLE ADDRESSES
"COTTOFRANK NEWYORK"
"COTTOFRANK WASHINGTON"
"COTTOFRANK PARIS"

October 20, 1969

Re: Russ Togs, Inc., et al. v.
Grinnell Corporation, et al.

Dear Judge Metzner:

Enclosed for your consideration is defendants' proposed order effectuating your decision of October 3, 1969 denying defendants' motion for partial summary judgment. Defendants' proposed order also: (a) provides for the entry of partial summary judgment with respect to the two complaints filed after September 9, 1968, and (b) contains a statement pursuant to 28 U.S.C. § 1292(b), so as to permit an application to the Court of Appeals for an interlocutory appeal of this decision.

In the first instance, defendants ask certification of all issues raised by their motion; alternatively, we ask certification of the question whether, in view of the one-year grace period added by the 1955 amendments, plaintiffs had an additional 60-day (or "appeal time") grace period within which to take advantage of the tolling provision in § 5(b) of the Clayton Act. In both instances, defendants respectfully submit that the statutory grounds for certification are present, and that this is indeed a classic example of a controlling decision as to which "an intermediate appeal may avoid protracted and expensive litigation", Milbert v. Bison Laboratories, 260 F.2d 431, 433 (3d Cir. 1958).

1. *An immediate appeal may materially advance the ultimate termination of the litigation.* Six of the actions to which defendants' motion is directed are alleged class actions, and the remaining 60 actions involve hundreds of plaintiffs and a much larger number of protection service contracts executed at different times and in different circumstances. If defendants' position is well-founded, either in whole or in part, hundreds of claims based upon these individual transactions are time-barred, and a monumental waste of the energies of all concerned would result from forcing these cases to run their full course in this Court before any review of the instant decision.

Cases posing such problems, where there may be a statute of limitations defense, are precisely the kind of cases Congress contemplated would, and should, be materially advanced by an interlocutory appeal. See, *e.g.*, S. Rep. No. 2434, 1958 U.S.C. Cong. and Adm. News, p. 5255; H. Rep. No. 1667, 85th Cong., 2d Sess., to accompany H. R. 6238 (1958); Hearings Before Subcommittee No. 3 of the Committee on the Judiciary, House of Rep., 85th Cong., 2d Sess., on H. R. 6238, Ser. 11; and *Austrian* v. *Williams*, 198 F.2d 697 (2d Cir.), *cert. denied*, 344 U.S. 909 (1952), cited throughout the legislative history.

In short, this decision presents in multiple form the problems arising when a District Court has decided a statute of limitations issue "in a manner which keeps the litigation alive but which, if answered differently on appeal, would terminate the case", *United States* v. *Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959), and accordingly this decision is eminently ripe for certification.

2. *The order to be entered involves a controlling question of law.* A "controlling question of law" within the meaning of § 1292(b) is one which is determinative of a basic issue in the case. While the decision should not be merely collateral or incidental, it need not involve a question dispositive of the entire litigation. See *United States* v. *Woodbury*, *supra*; *Kroch* v. *The Texas Co.*, 167 F. Supp. 947 (S.D.N.Y. 1958). Orders denying motions to eliminate private antitrust claims barred by the statute of limitations are typical of those which the Second Circuit as well as other

courts have allowed to be certified or appealed. See Herman Schwabe, Inc. v. United Shoe Machinery Corp., 274 F.2d 608 (2d Cir.), cert. denied, 363 U.S. 811 (1960); Banana Distributors, Inc. v. United Fruit Co., 269 F.2d 790 (2d Cir. 1959); Bertha Building Corp. v. National Theatres Corp., 269 F.2d 785 (2d Cir. 1959); Atlantic City Electric Co. v. General Electric Co., 312 F.2d 236 (2d Cir. 1962), cert. denied, 373 U.S. 909 (1963); United Shoe Machinery Corp. v. International Shoe Machine Corp., 275 F.2d 459 (1st Cir. 1960).

3. The controlling question is one as to which there is substantial ground for difference of opinion. Without reiterating here the contentions raised by defendants which the Court has considered and rejected, defendants respectfully urge that the order is uniquely suited for interlocutory review because controlling precedents are lacking for the Court's determinations that (a) Congress, in adding the one-year tolling provision to § 5(b) in 1955, intended that the one year should not begin to run until 60 days after entry of the final judgment, and (b) the Government action continued to "pend" after all liability aspects of the original judgment were affirmed by the Supreme Court. These issues are quite likely to arise again in other cases.

Only by implication can the Supreme Court's decision in Minnesota Mining & Mfg. Co. v. New York Wood Finishing Co., 381 U.S. 311 (1965), and the subsequent interpretation of it by other courts (in cases not germane to these), be said to undermine the cases upon which defendants rely for the liability-relief distinction -- a distinction not rejected by those other courts. Indeed, defendants believe their contentions are wholly consi[illegible] with the policy of 3M and will not deprive even modera[illegible] diligent antitrust plaintiffs of any of the benefits which Congress intended to give them.

At the very least, there are substantial grounds for difference of opinion as to whether the 60 days "appeal time", when no appeal is taken, runs consecutively or concurrently with the statutory "one year thereafter", or whether Congress intended the latter as an extension of and substitute for the preexisting judicial standard of a 60-day grace period. Even if certification is limited to this latter question, it would affect three alleged class actions (on behalf of all governmental entities in the States of New Jersey, Connecticut and Maryland) and one other complex case, Twentieth Century Fox Film Corp. v. Grinnell Corporation, et al. (S.D.N.Y. 68 Civ. 3229).

Finally, it should be noted that defendants are not seeking a stay of proceedings in the District Court pending such an appeal. Instead, defendants intend to diligently pursue their appeal while continuing to cooperate with plaintiffs to expedite discovery in the District Court.

For the above reasons, we respectfully urge that the Court give the certification required to permit the Court of Appeals to grant appellate review at this stage.

Sincerely,

Denis McInerney

Denis G. McInerney

Honorable Charles M. Metzner
United States District Judge
United States Courthouse
Foley Square
New York, New York

cc: Weil, Gotshal & Manges, Esqs.
Parker, Chapin & Flattau, Esqs.
Liebman, Eulau, Robinson & Perlman, Esqs.
Casey, Lane & Mittendorf, Esqs.

White & Case, Esqs.
Kelley Drye Newhall Maginnes & Warren, Esqs.
Olwine, Connelly, Chase, O'Donnell
& Weyher, Esqs.

EXHIBIT 3

COPY

October 21, 1969

Hon. Charles H. Metzner
United States District Judge
United States Courthouse
Foley Square
New York, New York

Re: Russ Togs, Inc., et al v.
Grinnell Corporation, et al

Dear Judge Metzner:

There is submitted herewith a proposed order on behalf of the plaintiffs pursuant to your Honor's decision dated October 3, 1969, on defendants' motion for partial summary judgment.

This proposed order differs from that submitted by the attorneys for the Grinnell Corporation in that it does not provide for certification pursuant to 28 U.S.C. §1292(b) to the Court of Appeals of the questions decided by your Honor.

The plaintiffs submit that the questions of law decided herein do not involve areas as to which there is substantial ground for differences of opinion within the meaning of 28 U.S.C. §1292(b). It is respectfully submitted that the authorities relied upon by plaintiffs in opposition to the motion and the opinion thereon dated October 3, 1969, make it abundantly clear that the decision reached by the Court herein clearly accords with the authorities relating to the pendency of a Government action and with the mandates of the Supreme Court of the United States as to the approach to be taken in the determination of issues such as were passed on in the instant application. A basic prerequisite for certification is thus lacking.

COPY

It is further apparent that the ultimate termination of the litigation before this Court would not be materially advanced by an immediate appeal from this order. Regardless of the outcome on this motion, each of the plaintiffs who have brought suit would continue to have a cause of action against the defendants. Moreover, there exists a substantial number of plaintiffs to which the motion was not addressed whose cases involve most of the questions raised in the matters as to which the motion applies. Therefore, appellate review at this time would not materially shorten the time necessary to dispose of the pending litigation.

Certification is therefore opposed by the plaintiffs to which defendants' motion is addressed, including those who seek the inclusion of the "appeal time" in order to secure the benefit of the tolling provisions of Section 5(b) of the Clayton Act.

For the above reasons, the plaintiffs respectfully urge the Court to deny certification, as requested by the defendants, and to sign the order submitted on behalf of the plaintiffs.

Very truly yours,

Barry J. Brett

BJB:njc
Enclosure

cc: Cahill, Gordon, Sonnett, Reindel & Ohl
White & Case
Kelly Dryer Newhall Maginnes & Warren
Stickles, Hayden, Kennedy, Kort & Van Steenburgh
Casey, Lane & Mittendorf
Weil, Gotshal & Manges
Liebman, Eulau, Robinson & Perlman
Royall, Koegel & Wells
Berman, Paley, Goldstein & Berman

BEST COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al., v. GRINNELL CORPORATION, et al.	68 CIV. 4026 (E.D. PA. CIV. 68-1478)
MANHATTAN-WARD, INC., et al., v. GRINNELL CORPORATION, et al.	68 CIV. 4028 (E.D. PA. CIV. 68-1480)
1225 VINE STREET BUILDING, INC., et al. v. GRINNELL CORPORATION, et al.	68 CIV. 4027 (E.D. PA. CIV. 68-1479)

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

M. WADE KINSLY, being duly sworn, deposes and says:

1. This affidavit is submitted to confirm to this Court that the "Troika", which was officially designated by this Court in Pre-Trial Order No. 1, dated July 2, 1969, wherein it was provided:

> "All subscriber plaintiffs will be represented by Weil, Gotshal & Manges, by Ira M. Millstein; Parker, Chapin & Flattau, by [illegible] J. [illegible]; and [illegible], [illegible], Robinson & [illegible], by Herbert [illegible], as lead counsel. Liaison counsel will be Parker, Chapin & Flattau."

has diligently performed its responsibilities throughout the [illegible]

1969 through 1971, organizing, coordinating and pursuing the substantive and administrative pre-trial measures required to perform their functions in behalf of all subscriber plaintiffs, including the three captioned class actions.

2. I am personally familiar with the facts involved in these actions because the law firm with which I am associated, Gould & Wilkie, Esqs., is counsel of record in an individual action which it instituted in 1967 in the Southern District of New York in behalf of one of the subscriber plaintiffs, Associated Dry Goods Corporation (Associated Dry Goods Corporation, et al. v. Grinnell Corporation, et al., 67 Civ. 2606). I have thus been associated with the activities of the coordination by plaintiffs' counsel both before the formalizing of the Troika in 1969 and since that time.

3. Without any doubt, such Troika activities which I have witnessed personally by attendance at meetings, conferences, telephone calls, receiving and dispatching correspondence, etc., has substantially aided all of the some 60 plaintiff subscriber actions, including the above-captioned three class actions.

4. Were it not for the sustained and successful efforts of the Troika in defeating the defendants' motion for partial summary judgment on the basis of the statute of limitations, and the Troika's sustained efforts in formulating and spearheading the demands for unified production of documents and interrogatories, and the numerous other pre-trial steps which it successfully progressed, the status of the cases would not have reached the state in which they were, thereby permitting

the class action record attorneys to reach the settlement point when they did and in the amount they did. Were it not for the Troika, the class action record attorneys would have been required to perform a much greater amount of work.

5. Since counsel of record for the class actions has thus benefited from their reliance on the efforts of the lead and liaison counsel - the Troika - aside from whatever contribution counsel of record for the class actions may have made, it is submitted that proper recognition of the work of the Troika in helping to progress the cases to the state where a settlement could be negotiated in the amount currently before the Court, should be made by allocation from the settlement fund of part of the counsel fees to the Troika.

M Wade Kimsey

M. Wade Kimsey

Sworn to before me this

2[illegible] day of April, 1972.

John F. Boyer

Notary Public

(Seal)

JOHN F. BOYER
Notary Public, State of New York
No. 31-5406100
Qualified in New York County
Commission Expires March 30, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al., : 68 Civ. 4026
(E.D. Pa. Civ. 68-1478)
v.
GRINNELL CORPORATION, et al. :

MANHATTAN-WARD, INC., et al. : 68 Civ. 4028
(E.D. Pa. Civ. 68-1489)
v.
GRINNELL CORPORATION, et al. :

1225 VINE STREET BUILDING, INC., et al., : 68 Civ. 4027
(E.D. Pa. Civ. 68-1479)
v.
GRINNELL CORPORATION, et al. :

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

HERBERT ROBINSON, being duly sworn, deposes and says:

1. This affidavit is submitted to supplement the affidavits of ALVIN M. STEIN and A. PAUL VICTOR and in support of the relief therein requested. It is respectfully urged that the attorneys' fee to be awarded in connection with the settlement fund be not in excess of 20% of such gross settlement fund and that the "Troika" receive an award of at least 25% of the amount so awarded as counsel fees for the crucial and important role which they performed in helping to create the settlement fund in the size presently before this Court.

2. I am a senior partner of the law firm of Liebman, Eulau, Robinson & Perlman, which is one of the three law firms

constituting the "Troika" (lead counsel) designated by this Court in Pre-Trial Order No. 1 dated July 2, 1969.

3. Prior thereto, in 1967 and 1968, my law firm initiated six individual actions against the same defendants for substantially the same violations of the antitrust laws (67 Civ. 2259, 2615, 2616 and 3820, and 68 Civ. 2361 and 2509).

In addition to the participation of my law firm, as above described and as described below, in the activities of the Troika, my law firm represents some 60 claimants in the class.

4. From the commencement of the actions brought on behalf of subscribers, my law firm has played a significant role in acting on behalf of all subscriber plaintiffs in seeking to advance the progress of the actions and bring about the earliest and most favorable disposition of the pending actions. Our efforts and activities, both before and after the formalization of the Troika, included activities of a substantive and administrative nature which were performed as part of a lead group on behalf of all subscriber plaintiffs, including the three above-captioned class actions. Necessarily, these activities involved constant coordination, study and consultation, which was not required in connection with the six individual actions in which my firm appeared of record. Thus, much of the time and work expended by us was not related to any services necessary for the prosecution of the six actions in which we appeared as counsel of record. Moreover, and most significantly, the activities performed by my firm and the other firms constituting the Troika were the primary forces in advancing all of the subscriber actions, including the class actions, to the point which made possible the settlement

reached by counsel of record in the above-captioned class actions. I respectfully submit that if these activities of the Troika had not been performed, the class action settlement would not have been reached at the time and in the amount presently before the Court for approval. There is set forth below, in capsule form, an enumeration of the areas and kinds of activities performed by the attorneys of my firm as part of the Troika in connection with the prosecution of the subscriber actions and which contributed substantially to the class action settlement.

5. Both prior and subsequent to the action of the Judicial Panel on Multidistrict Litigation, my firm played one of the more significant roles in arranging and promoting the coordination among plaintiffs' counsel which brought some measure of order and direction to the activities of plaintiffs' counsel. In the very preliminary stage of this litigation in the Southern District, the defendants moved pursuant to Rule 12 (f) to strike parts of plaintiffs' complaints. This resulted in numerous and diverse presentations by various plaintiffs' counsel representing various and conflicting arguments. A simple cosmetic motion imposed on Judge Cooper an avalanche of papers and a small army of attorneys at the argument. The subsequent coordination which we helped promote resulted in a unified, consistent and joint position on behalf of subscriber plaintiffs, including the above-captioned three class actions. My firm's activities in connection with bringing about this coordination included, among other things, the following:

(i) helped organize and conduct the plaintiffs' counsel meetings and conferences;

(ii) provided substantial familiarity with the background of the proceedings based upon our early completion of

(a) legal research re scope and effect of Judge Wyzanski's findings;

(b) research re records of proceedings before Judge Wyzanski on remand, in Washington, D.C. (1967);

(c) examination and analysis of entire record in government case (1967);

(iii) organized and conducted the meeting of plaintiffs' counsel at the Statler Hotel in Washington on August 7, 1968, setting up coordination among plaintiffs' counsel in accordance with the request of the Judicial Panel on Multidistrict Litigation;

(iv) participated in organizing and conducting the meetings among plaintiffs' counsel which resulted in the establishment of the Troika;

(v) since Pre-Trial Order No. 1 dated July 2, 1969, establishing the Troika, in addition to the substantive activities enumerated below, my firm, together with the other firms constituting the Troika, has engaged in considerable activities which were essentially administrative and procedural in connection with the basic objective of promoting uniform and consistent approach.

A review of the records of my firm shows that our activities as above described involved the expenditure of several hundreds of hours (constituting part of the thousands of hours expended) by attorneys of my firm, which includes myself, Lewis M. Dabney, Jr., Esq., and various associates.

6. With the possible exception of the activities with respect to the statute of limitations motion more specifically set forth below, the most significant activity in connection with the prosecution of these cases by my firm and the Troika was the institution and promotion of plaintiffs' uniform pre-trial discovery requests. This pertained both to the plaintiffs' uniform first set of interrogatories and to the plaintiffs' unified Rule 34 application. To accomplish this work, the Troika designated a discovery subcommittee on which I and Mr. Dabney of my firm played a leading part. Manifestly, the conduct of discovery under the aegis of the Troika, in which we also played a leading role, made possible the trial preparation and the advance of these cases to the posture in which the settlement of the above-captioned class actions was made possible. This is recognized by the disingenuous suggestions in Paragraph 6 of the "Petition of Counsel for the Class Representatives for Award of Counsel Fees and Costs", where petitioner claims credit for participation in plaintiffs' discovery activities and drafting the motion for the production of documents. In point of fact, the laboring oar in connection with the preparation of the Rule 34 application was carried by my firm. Significantly, we had prepared the Rule 34 applications very promptly and forwarded our applications to Mr. Berger's firm on July 24, 1968, before the class action cases were transferred to New York. A copy of my letter is attached as Exhibit A. Thereafter petitioner did, along with the members of the Troika, participate in refining the Rule 34 requests into the document eventually

served upon the defendants.

It is a matter of interest that Mr. Berger's firm may never have entered this litigation but for me. By coincidence, I met Herbert B. Newberg, Esq. of that firm in or about October, 1967. In the course of conversation, I mentioned the litigation I had instituted on behalf of several plaintiffs in connection with Central Station Protection Services. Shortly thereafter, Mr. Newberg wrote to me under date of November 7, 1967, stating in part:

> "You mentioned that your office was involved in representing plaintiffs against the manufacturers of burglar alarms who are charged with antitrust violations. We represent some clients who may have claims arising from purchases of burglar alarms and would appreciate it if you would send us a copy of the Complaint which you filed in that action together with a brief explanation as to the status of this litigation."

I responded promptly, complying with his request, by my letter dated November 9, 1967, wherein I wrote in part:

> "In accordance with your request, I am enclosing a copy of the complaint filed in Allied Stores Corporation, et al. v. Grinnell Corporation, et al. We have instituted discovery procedures and a conference among plaintiffs' counsel and defendants' counsel is scheduled in the near future.

Copies of said letters are attached as Exhibits B and C.

7. On or about June 10, 1969, the defendants moved for partial summary judgment based upon the statute of limitations in the three class actions as well as many of the other actions. In essence, they sought a determination which would

have limited the period which the class actions covered to the four years prior to the date of the filing of the complaints herein on July 10 and 11, 1968, rather than back to at least April 13, 1957, a period of 11 years (not 4 years). I was the attorney principally in charge of the development of the factual matters set forth in opposition to that motion on behalf of all subscriber plaintiffs, including those in the class actions. The only affidavit (with accompanying supporting exhibits) submitted on behalf of the plaintiffs on that motion was my affidavit sworn to August 1, 1969. In addition, my firm joined with other members of the Troika and other counsel in preparing the memoranda and arguments and briefs in opposition to the defendants' motions in this District Court and in the United States Court of Appeals for the Second Circuit, as well as in opposition to the defendants' petition for certiorari to the United States Supreme Court. While counsel of record for the class actions did join in, their role was minor. We disagree with petitioner's suggestion (Petn. ¶9) that his firm's activities in connection with this application to the Court of Appeals were of particularly great moment. Mr. Berger's slight participation before the Court of Appeals was a matter of surprise and distress to me and to the several counsel who spent many hours in preparation for that argument. Those of us who had developed a uniform presentation and agreed upon a single counsel to present the argument on behalf of the plaintiffs had no advance knowledge that Mr. Berger intended to participate, as developed on the morning of the argument, notwithstanding his lack of any participation in the development of the argument which was coordinated and spearheaded by the Troika. The actively participating counsel had agreed that the objectives of the appellees would be best served by a single counsel representing the argument developed by us and having a member of the Troika, Barry J. Brett, Esq., present at the counsel table to assist and represent any interest of the subscribers which might be required.

I was present at the argument before the Court of Appeals, and it is my opinion that Mr. Berger did not add any meaningful contribution to the favorable result reached. Furthermore, virtually all of the analyses, research and drafting in connection with the brief in opposition to defendants' petition for certiorari to the United States Supreme Court was done by the Troika. My firm spent several hundreds of hours in connection with the work on the statute of limitations problem.

8. Aside from the general categories of coordination, discovery and statute of limitations activities referred to above, my work and the work of my firm in connection with its Troika responsibilities included:

(i) Legal research re such items as pre-trial discovery, requests to admit, fraudulent concealment, interrogatories, estoppel, and prima facie effect of the government proceeding.

(ii) Frequent conferences, telephone calls and meetings with plaintiffs' attorneys and, as required, with defendants' attorneys, during 1967, 1968, 1969, 1970 and 1971.

(iii) Study of contract data reports, competition reports, and other documents secured in Washington.

(iv) Frequent communication with and submission of drafts to other members of the Troika and analysis of and comments with respect to materials submitted by them.

(v) Concentrated activity in the discovery subcommittee of the Troika and, in connection therewith, with other plaintiffs' attorneys, keeping them advised (including counsel of record for the class actions).

(vi) Research and conferences in connection with the damage subcommittee of the Troika.

(vii) Substantive and tactical reports at the various plaintiffs' counsel conferences prior to pre-trial hearings.

(viii) Attendance at each of the court pre-trial hearings prior to Pre-Trial Orders numbered 1 through 6, the first one being dated July 2, 1969, and the sixth one being dated February 5, 1971.

It was by Pre-Trial Order No. 1, dated July 2, 1969, that this Court designated the Troika. Such order provided in part:

> "All subscriber plaintiffs will be represented by Weil, Gotshal & Manges, by Ira M. Millstein; Parker, Chapin & Flattau, by Barry J. Brett; and Liebman, Eulau, Robinson & Perlman, by Herbert Robinson, as lead counsel. Liaison counsel will be Parker, Chapin & Flattau."

Thus, the Troika, which up to that point had been acting on an informal basis, was formalized by order of this Court. I had participated in the activities which were the Troika's responsibilities both before and subsequent to such formalization (having been in this litigation since 1967).

(ix) Work performed in connection with the decision of Judge Metzner dated September 19, 1969, in Damon Alarm Corp. et al. v. American District Telegraph et al., pertaining to the amendment of some 24 complaints dealing with AFANY.

(x) Work preliminary to the letter dated July 24, 1969, by Barry J. Brett to this Court, advising of the disposition by agreement of counsel with respect to motions filed June 9, 1969, except with respect to matters pertaining to AFANY.

(xi) Motions made August 20, 1970, and stipulation and order substituting "AFA Protective Systems, Inc. in place of Automatic Fire Alarm Co. of Delaware and Automatic Fire Alarm Co." and pertaining to the consolidation and merger of those companies and the decision of Judge Metzner thereon.

(xii) Repeated circularization of drafts, and revisions of drafts, of letters and other documents pertaining to all plaintiffs' cases.

(xiii) Preparation for conferences and meetings with Judge Metzner.

(xiv) Participation in the drafting and dispatching of various follow-up letters (and data on which they were based) to defendants pertaining to the production of documents under Rule 34 and the delivery thereof to Morgan Manhattan Storage Warehouse for study by all plaintiffs, first at 205 Pearl Street and then at 76 Varick Street.

(xv) Participation in the drafting and dispatching of various follow-up letters (and data on which they were based) to the defendants to comply with the answers required by the uniform interrogatories served under Rule 33.

(xvi) Formulation of proposals to the Court for detailed scheduling and completion of all pre-trial matters.

9. The foregoing is not a complete listing of the numerous items which were taken care of by my firm and the other members of the Troika, but rather is intended to be a partial listing indicative of the tremendous activity on our part from the year 1967, in 1968, in 1969, in 1970, and up to the issuance of Settlement Order No. 1 on December 13, 1971. Such work involved the expenditure of several thousand hours by me personally and Lewis M. Dabney, Jr., Esq. (graduate of Harvard Law School, Class of 1924), and since June 6, 1971, by Nathaniel Fensterstock, Esq. (Columbia Law School, Class of 1937, who had retired after 24 years of service as Chief of the Litigation and Condemnation Division and Senior Attorney of the Port of New York Authority, and who since that time is counsel to my firm), and also by certain associates.

Although it may be repetitive of the listing included above, it is important to point out that the Troika made it possible to have coordinated uniform interrogatories, coordinated uniform production of documents, coordinated activities with the defendants' attorneys, coordinated uniform research, coordinated uniform memoranda and briefs, and coordinated activity, which is really what placed all this litigation (including the three class actions) in the state in which it became possible for David A. Berger, P.A. to negotiate the settlement.

10. The settlement, by its express language, was applicable to many classes of plaintiffs, including all of the individual subscriber plaintiffs who were represented by counsel other than the firm of David A. Berger, P.A. The language of the settlement agreement expressly covers all of the approximately 59 subscriber actions, whereas Mr. Berger's firm was counsel of record in only three of such actions. I am informed, and verily believe, that some subscribers which brought private actions did not "opt out" of the classes.When the settlement fund was negotiated, the classes described included all 59 who had brought private actions and on whose behalf the Troika had acted, including the class action plaintiffs. Therefore, it was possible for the attorney of record in the three class actions to urge upon the defendants a much larger settlement fund because the settlement agreement thus covered the other (approximately) 56 actions. Neither he nor the defendants could possibly have known, at the time the settlement amount of $10,000,000.00 was agreed upon, which of these other 56 plaintiffs would elect to "opt in" and which would elect to "opt out". Obviously, if the scope of the classes provided for in the settlement had not covered these 56 other actions, which had been aided by the Troika and some of which have "opted into" the class, the amount the defendants would have been willing to pay into such settlement fund would presumably have been less. Thus, for this reason also, the coordination resulting from the activities of the Troika enabled the amount of the settlement fund to be accordingly increased. In other words, the work done by the Troika furnished a platform from which Mr. Berger's firm was able to proceed (1) to negotiate a settlement and (2) to effect a settlement in its undoubtedly increased amount, i.e., $10,000,000

11. I am informed, and verily believe, that the complaints utilized in the above-captioned class actions (68 Civ. 4026, 68 Civ. 4027, and 68 Civ. 4028) (with the exception of the first two pages and the last two pages beginning at approximately page 21) are xerox copies of the complaint in 68 Civ. 2766, The Port of New York Authority v. Grinnell Corporation, et al., instituted July 8, 1968, just prior to the institution of the class actions on July 10 and 11, 1968. Comparison shows that they are xerox copies of the pages of the Port Authority complaint, except for the top pages and the last two or three pages of each such complaint - the prayer for relief. This is confirmed by Nathaniel Fensterstock, Esq. (counsel to my firm since his retirement from the Port Authority in June 1971). Indeed, comparison of each of such complaints with the Port Authority complaint shows that they are picture copies, with short pages where there are short pages, short lines where there are short lines, etc.

12. Whatever work was done by the firm of David Berger, P.A. was as one of many attorneys in the some 60 to 80 litigations involved in these violations of the antitrust laws. It would not be equitable to give the entire attorneys' fee in this settlement to David Berger, P.A., where, as here, the Troika did so much to make it possible. To state it differently, the creation of this settlement fund was not due only to the efforts of counsel of record in the class actions, but also, in large measure, to the efforts of the Troika. The hours spent by the Troika are far in excess of those that could possibly have been spent by counsel of record in the class actions. The Troika truly helped to create the settlement fund and should share in any attorneys' fees granted in connection therewith.

From the inception of the Troika there were discussions at various conferences of plaintiffs' counsel concerning th compensation which would be paid to the Troika for its services i undertaking the laboring oar on behalf of all plaintiffs. I recall that a representative from Mr. Berger's firm was present at a number of these meetings. [illegible] present agreed, expressly in some cases, tacitly in others, that the Troika should receive special compensation, which was recognized in the discussions in a pre-trial conference before Judge Metzner on December 3, 1969. While various proposals were advanced and discussed with respect to the appropriate compensation to be paid to the Troika, no precise formula was ever reached. However, all participants recognized that such compensation would be equitable.

13. There is no question about the abilities and standing of the three law firms constituting the Troika:

Weil, Gotshal & Manges;
Liebman, Eulau, Robinson & Perlman; and
Parker, Chapin & Flattau.

14. To the extent that the results achieved were favorable to the interests of the class members, they were in a large part made possible by the Troika.

15. The enforcement of the antitrust laws in this case was due largely to the contributions of the Troika and was not due solely to the efforts of counsel of record for the class actions, for the reasons indicated above and in the accompanying affidavits.

16. Had it not been for the successful efforts of the Troika in defeating the defendants' attempt to limit the scope of the damage claims via their motion for partial summary judgment on the basis of the statute of limitations - had it not been for the Troika's efforts in formulating appropriate demands for production of documents and interrogatories - had it not been for the Troika taking all the other pre-trial steps which it

did, the class action attorneys would not have reached the settlement when they did, in the amount they did, and with the lesser and minimal work effort involved on their part.

17. To a large extent, counsel of record for the class actions has relied on the efforts of lead and liaison counsel. The Troika carried the laboring oar in advancing the cases to the state where it was possible to reach a settlement in the class actions. While we acknowledge the contribution made by Mr. Berger's firm herein, I submit that appropriate recognition thereof may be made in the allocation of counsel fees.

18. I respectfully submit that this Court should take all these facts and circumstances into account in deciding the attorneys' fee to be awarded and to conclude that a maximum of 20% of the gross settlement fund of $10,000,000 would be an adequate attorneys' fee and that the Troika receive an award of at least 25% of whatever amount is awarded as counsel fees.

Herbert Robinson

Sworn to before me this
8th day of May, 1972.

Notary Public

ALAN PAUL ANSELL
Notary Public, State of New York
No. 41-023155
Qualified in Queens County
Commission Expires March 30, 1973

July 24, 1968

Herbert B. Newberg, Esq.
Messrs. Cohen, Shapiro, Berger, Polisher & Cohen
Philadelphia Saving Fund Building
Philadelphia, Pa. 19107

Re: Allied Stores Corporation, et al
v. Grinnell Corporation, et al

Dear Herb:

Enclosed please find copies of our Rule 34 motion and of our interrogatories under Rule 33 in the Allied Stores case. They are substantially similar to those we have served in two of the other cases in which we represent plaintiffs (out of a total of six separate plaintiff groupings).

I hope that these will prove helpful. In any event let me know of any developments in the Philadelphia litigation.

Best personal regards.

Sincerely,

Herbert Robinson
For LIEBMAN, EULAU, ROBINSON & PERLMAN

HR/Z
Encl.

EXHIBIT A

LAW OFFICES
Cohen, Shapiro, Berger, Polisher and Cohen

ABRAHAM L. SHAPIRO
SYLVAN M. COHEN
REUBEN E. COHEN
ALBERT STEINBERG
IRVING I. SPECTER
ROBERT FREEDMAN
BENNETT L. AARON
E. BURTON KERR
MARK K. KESSLER
HAROLD GREENBERG
RICHARD B. LADEN
PHILIP M. BRANDT

EDWARD N. POLISHER
DAVID BERGER
PHILIP M. SHIEKMAN
SAMUEL H. LANDY
NORMAN C. HENSS
NATHAN B. FEINSTEIN
SIDNEY MARGULIES
HERBERT B. NEWBERG
MAYOR SHANKEN
H. LADDIE MONTAGUE, JR.
MURRAY A. ZATMAN
HOWARD L. SCHAMBELAN

ALBERT M. COHEN
1928-1956

TWENTY-SECOND FLOOR
PHILADELPHIA SAVING FUND BUILDING
PHILADELPHIA, PA. 19107
(215) WA 2-1300

WASHINGTON OFFICE
SUITE 300
1700 PENNSYLVANIA AVENUE

CABLE ADDRESS
COSAC

November 7, 1967

Herbert Robinson, Esquire
Liebman, Eulau, Robinson & Perlman
32 E. 57th Street
New York, New York

Re: Burglar Alarms Antitrust

Dear Mr. Robinson:

I enjoyed meeting and talking with you during the recent 150th Anniversary of Harvard Law School. I found that entire weekend restful and trust that you found it likewise.

You mentioned that your office was involved in representing plaintiffs against the manufacturers of burglar alarms who are charged with antitrust violations. We represent some clients who may have claims arising from purchases of burglar alarms and would appreciate it if you would send us a copy of the Complaint which you filed in that action together with a brief explanation as to the status of this litigation.

With best wishes,

Sincerely,

Herbert B. Newberg
Herbert B. Newberg

HBN/mh

EXHIBIT B

November 9, 1967

Herbert B. Newberg, Esq.
Cohen, Shapiro, Berger, Polisher and Cohen
Philadelphia Saving Fund Building
Philadelphia, Pennsylvania 19107

Dear Mr. Newberg:

Thanks for your letter of November 7. I have been keeping in mind our promise to communicate with each other, so I am glad that you pressed the button to spur me on.

In accordance with your request, I am enclosing a copy of the complaint filed in Allied Stores Corporation, et al. v. Grinnell Corporation, et al. We have instituted discovery procedures and a conference among plaintiffs' counsel and defendants' counsel is scheduled in the near future. Issue has not been joined and we have granted the defendants their fourth or fifth extension of time to answer.

Please let me know what action your firm takes in this matter.

I hope that you will see fit to call me when you are in New York.

Sincerely yours,

Herbert Robinson
for LIEBMAN, EULAU, ROBINSON & PERLMAN

HR:CM

Inclosure

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al., v. GRINNELL CORPORATION, et al.	:	68 CIV. 4026 (E.D. PA. CIV. 68-1478)
MANHATTAN-WARD, INC., et al., v. GRINNELL CORPORATION, et al.	:	68 CIV. 4028 (E.D. PA. CIV. 68-1489)
1225 VINE STREET BUILDING, INC., et al., v. GRINNELL CORPORATION, et al.	:	68 CIV. 4027 (E.D. PA. CIV. 68-1479)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

NATHANIEL WHITEHORN, being duly sworn, says:

1. I am a member of the firm of Botein, Hays, Sklar & Herzberg. We represent Hart Schaffner & Marx and thirty-seven other subscribers of central station protection services provided by the defendants. A list of our clients is appended to this affidavit as Exhibit "A". Our clients had brought their own suit against the defendants in July 1968, which suit was pending until our clients elected to join this class action. In all, they have filed claims in this proceeding amounting to approximately $780,000 of billings substantially all of which have been allowed by the class action committee. This affidavit is submitted in opposition to the proposed settlement of this class action

and in opposition to the application by counsel for the class for an allowance of counsel fees in the amount of 25% of the settlement fund.

2. We oppose the proposed settlement of this action on the ground that it is grossly inadequate and unfair to the members of the class.

3. This Court is familiar with the history of this litigation and we will not attempt now to recount its entire course. Suffice it to say, this litigation derived from the civil action brought by the United States for injunctive relief and divestiture against these defendants for violations of Sections 1 and 2 of the Sherman Act. The United States was successful in that action. United States v. Grinnell Corporation, 384 U.S. 563 (1966), aff'g, 236 F.Supp. 244 (D.R.I. 1964). Speaking for the Supreme Court, Justice Douglas affirmed the finding made by Judge Wyzanski that the defendants have monopolized central station protective services throughout the country, a monopoly, as Justice Douglas said, "...that was achieved in large part by unlawful and exclusionary practices." 384 U.S. at 576. Of course, this decision in favor of the United States does not estop the defendants from relitigating here the issues of liability so well established against them by the Supreme Court's decision. See U.S. v. Grinnell Corp., 307 F.Supp. 1097 (S.D.N.Y. 1969). But the judgment in favor of the United States is prima facie evidence against these defendants on the question of liability, section 5(a) of the Clayton Act as amended, 15 U.S.C. §16(a), and, I submit, strongly suggests the ultimate success of plaintiffs in this action for treble damages. Considered in this light, a recovery by the members of the class of approximately 3% of the

aggregate amount exacted from them by the monopoly (before deduction of any allowance for counsel fees or disbursements that may be made herein) is inadequate.

4. The claims filed in this proceeding--a total of $329,598,877.81 according to the report of the class action committee--were based on the amount of purchases made by the claimants from the defendants for central station protection services, not on the amount of damages suffered by the members of the class. However, there is no question that the amount of damages suffered by the claimants is far in excess of the $10 million offered by the defendants as a settlement. In the first suit by the United States against these defendants, Judge Wyzanski found that where the defendants encountered competition their rates were as much as 20% less than their standard annual service charge and as much as 40% less than their standard advance service charge. 236 F.Supp. 244 at 256. Even if the members of the class had been overcharged by only as little as 10%, their recovery under the proposed settlement is less than 1/3 of their actual damages. And this does not even take into account that, if successful, the members of the class would be entitled to treble damages as well as to their costs and attorneys' fees. For a case where liability already is *prima facie* certain, and where provable damages may be so substantial, a settlement of $10 million for damages suffered during eleven years of predatory, monopolistic activity is neither fair nor adequate.

5. Although our clients had brought their action timely and could have pursued their own recovery, they chose not to exclude themselves from this class action only because

it was never imagined that a settlement could have been recommended by class counsel which would result in a recovery so out of proportion to reasonableness. To be sure our clients were aware of the size of the proposed settlement when they made their decision to join the class, but what they did not know, and what only the defendants probably anticipated (and counsel for the class should have anticipated) when the offer was made and recommended, was the number and magnitude of the claims to this settlement fund. Defendants should not be allowed to escape the exposure they face here, where their liability already has all but been established, for approximately a 3% recovery to each claimant.

Even if the claimants could only establish damages of 1% of their billings they would each do better than they will under the proposed settlement. What is more likely is that the damages which claimants could establish would average, as a minimum, 10% of billings, resulting in a judgment of 30% of billings. Certainly claimants' risk of defeat is not so large as to justify a settlement of only 10% of probable minimum recovery. I respectfully urge that this Court not approve the proposed settlement unless the defendants offer to increase the fund to enable the claimants to receive at least 6% of their billings net of attorneys' fees and expenses.

6. If the Court determines to approve this settlement, then our clients oppose the application by counsel for the class for counsel fees of 25% of the entire settlement fund, or $2,500,000.

7. At the outset, for purposes of distributing the burden of counsel fees, I submit that the claimants should be separated into two categories: (a) those who retained their own attorneys and brought suits on their own (litigating claimants); and (b) those who simply have filed claims in this proceeding (non-litigating claimants). Only the amount distributable to those claimants in the second category should be subject to the counsel fees awarded by this Court. This allocation was recently adopted by Judge Harvey in connection with the plumbing fixtures litigation in Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., Civil Action No. 41774SC (E.D. Pa., filed April 28, 1972). It would be inequitable to subject the recovery of the litigating claimants to a deduction for counsel fees. These claimants already have agreed to compensate their own attorneys; thus, they will have to pay counsel fees twice if the suggested classification is not made. Moreover, the role of the separate suits brought by the litigating claimants should not be ignored inasmuch as these suits increase the exposure of the defendants and thereby have influenced their decision to make a settlement offer. Also, counsel for the litigating claimants contributed to the prosecution of this suit. For example, my firm was active in the pre-trial proceedings relating to discovery and researched points of law assigned to it by lead counsel. This is not to say that Mr. Berger was not the principal actor on behalf of all the claimants in negotiating the settlement now before the Court. But Mr. Berger will be compensated adequately pursuant to the agreement he has made with his individual clients and by the award he receives out of the share of the non-litigating claimants.

8. If any portion of any award for counsel fees be charged to litigating claimants, it is my opinion that the application for 25% of the entire settlement fund clearly is excessive and unreasonable.

Mr. Berger avers that, in all, his firm has so far expended 6,233.25 hours on this case, not including secretarial and clerical help, but including the time of paraprofessionals. The application shows that about 62-1/2% of that time was that of paraprofessionals. The application also estimates that about 1,000 additional hours will be required before these proceedings are completed. Assuming the distribution of those 1,000 hours among the attorneys and paraprofessionals in the same proportions and assuming a generous rate of $15 per hour for paraprofessionals (which would indicate an average salary of more than $20,000 a year for paraprofessionals), $67,515 of any fee would compensate applicant for the paraprofessional time. Assuming a generous average rate of $150 per hour for senior attorney time and $60 per hour for junior attorney time, the straight time compensation for all applicant's attorneys would be about $260,000. Thus the total fee on a generous straight time basis would be $327,500.

Admittedly, there is a contingency factor which must be considered in assessing counsel fees in class actions. As against such contingency factor there must be weighed the results achieved for the individual claimants who constitute the class. When the settlement recovers for the individual claimant as little as is proposed herein, the compensation for the contingency should not be great--probably not more than 50% of a straight time fee. Certainly it should not be the 750% of straight time which applicant seeks.

Consideration must also be given to the fact that it was the work of other counsel that defeated defendant's attempt to impose an interpretation of the statute of limitations which would have reduced substantially the period for which damages are recoverable herein. Such other counsel have applied for a portion of any counsel fees to be awarded. I know that said counsel performed important services in this matter above and beyond the motion and appeals with respect to the statute of limitations. Indeed, it is my opinion that this settlement, unsatisfactory as it may be, would not have been offered by the defendant had it not been for the services rendered by the so-called "Troika" (and to some small extent by other counsel including my firm). Since it is my contention that none of the counsel fees to be allowed herein should be charged to the "litigating claimants" whom my firm represents, I believe that it would not be fitting for me to take any position with respect to the Troika's application. However, if some part of allowed counsel fees be charged to our clients, I believe it would be most inequitable if a reasonable portion thereof were not awarded to the Troika.

9. I respectfully submit to the Court that the proposed settlement is inadequate and unfair and should not be approved unless the defendants offer to increase the fund so that the claimants will receive at least 6% of their billings net of attorneys' fees and expenses. If the settlement is approved, I urge that this Court divide the members of the class into two categories and assess the counsel fees the Court awards only against the share of the non-litigating claimants. If counsel fees are charged to our clients, then

I suggest that the application of the Troika for a portion of the fees awarded is meritorious, but the application by counsel for the class is for an excessive amount.

Nathaniel Whitehorn

Sworn to before me this
12th day of May, 1972.

Dorothy Darvas
Notary Public

DOROTHY DARVAS
Notary Public, State of New York
No. [illegible] Qual. in Kings Co.
Cert. filed in New York County Clerk
Commission Expires March 30, 1974

Arthur Frank, Inc.

Baskin Clothing Co.

Herman Kucharo's, Inc.

A. L. Zachry Co.

Jack Fox & Sons

C. J. Lang Clothing Co.

McLeod Watson & Lanier Co.

Merritt, Schaefer & Brown, Inc.

The Ray Beers Clothing Company

Small's Inc.

Wallachs, Inc.

Hart, Schaffner & Marx

The B. R. Baker-Cleveland Company

Wicks & Greenman, Inc.

Stevens, Inc.

Samuel Rosenblatt Co.

Leopold, Price & Rolle, Inc.

Liemandt's, Inc.

Jack Henry Clothing Co.

Gleneagles, Inc.

Frank Brothers, Inc.

Wolf Bros. Inc.

Heyward Mahon Company

James K. Wilson Co.

Littler, Inc.

McManus & Riley, Inc.

Morris Levy's Store for Men Inc.

Schreiber's

Stevens, Inc.

Hastings Clothing Co.

C. N. Vicary Co.

Capper & Capper Ltd.

Wolff's Clothiers, Inc.

Walker's Inc.

Shulman's, Inc.

F. B. Silverwood, Inc.

Levy's Inc.

Klopfensteins, Inc.

The Kleinhans Company, Inc.

EXHIBIT "A"

30.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER OF
ACCREDITED CENTRAL STATION PROTECTIVE SERVICES -
LITIGATION, 68, Civ. 4026, 4027 and 4028 (S.D.N.Y.)

NOTICE OF INTENTION TO APPEAR

Claimant, E. I. DU PONT DE NEMOURS AND COMPANY, pursuant to Paragraphs Nos. 4 and 6 of the Court's Order of December 13, 1971, as amended and modified by the Court's Order of April 3, 1972, herewith files its Notice of Intention to Appear through its counsel Edwin B. Connolly and Walter D. Ford, of the Delaware Bar, at the Hearing with respect to the approval of the proposed settlement, etc. on May 24, 1972, for the purpose of objecting to the proposed allocation of plaintiffs' attorneys' fees.

It is respectfully requested that claimant's Notice of Intention to Appear be entered and filed in the records of the Court.

E. I. DU PONT DE NEMOURS AND COMPANY,
CLAIMANT

By Walter D. Ford
WALTER D. FORD, OF COUNSEL
7073 Du Pont Building
Wilmington, Delaware 19898

Sir: Please
true copy of
duly entered
named court

Dated,

30-A

68 Civ 4026, -4027, -4028.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE

ACCREDITED CENTRAL STATION PROTECTIVE

SERVICES.

STATEMENT OF OBJECTIONS TO
AWARD OF COSTS AND ATTORNEY
FEES.

The undersigned EMIGRANT SAVINGS BANK, a member of the class concerned
in the above entitled class action hereby objects to payment of counsel fe
and reimbursement of costs as requested by David Berger, Esq., as attorney an
counsel for plaintiffs and objects on the ground that such fees and costs
are excessive for the services rendered.

EMIGRANT SAVINGS BANK

By: William R. White
Exec. Vice President

STATE OF NEW YORK)
:ss:
COUNTY OF NEW YORK)

WILLIAM R. WHITE, being duly sworn, deposes and says that he is an
Executive Vice President of the Emigrant Savings Bank herein, that he has
the foregoing statement of objections and knows the contents thereof, and
that the same is true to his own knowledge, except as to the matters ther
stated to be alleged upon information and belief, and as to those matters,
he believes it to be true.

Deponent further says that the reason this verification is made by
deponent and not by the Emigrant Savings Bank is because the said Emigrant
Savings Bank is a domestic banking corporation and deponent an officer t
to wit, its Executive Vice President.

William R. Wh

Sworn to before me this

11th day of May, 1972.

ANNE M. O'BRIEN
[illegible] New York
[illegible]
[illegible]
[illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------x

CITY OF DETROIT, et al, :

Plaintiffs, :

vs. : 68 Civ. 4026

GRINNELL CORPORATION, et al, :

Defendants. :

-----------------------------x

1225 VINE STREET BUILDING, INC., et al, :

Plaintiffs, :

vs. : 68 Civ. 4027

GRINNELL CORPORATION, et al :

Defendants.

-----------------------------x

MANHATTAN WARD, INC., et al, :

Plaintiffs, :

vs. : 68 Civ. 4028

GRINNELL CORPORATION, et al, :

Defendants. :

-----------------------------x

AFFIDAVIT IN OPPOSITION TO PETITION OF COUNSEL FOR CLASS REPRESENTATIVES FOR AWARD OF COUNSEL FEES AND COSTS.

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

BRADFORD P. COLCORD, being duly sworn, deposes and says:

1. He is a partner of the firm of Clare & Whitehead, 30 Rockefeller Plaza, New York, New York 10020, which firm is appearing in this action as counsel for Credit Services, Inc. and Longines-Wittnauer, Inc., as successor to Longines-Wittnauer Watch Co.,Inc. In this capacity such firm has filed claims totaling over $100,000 in aggregate which claims have been allowed.

2. This affidavit is submitted in opposition to the petition of the firm of David Berger P.A. of Philadelphia, Pennsylvania, of which David Berger, Esq. is a principal and presumably the senior partner. Such petition requests an allowance for expenses incurred to date of $14,918.73 and an allowance for estimated future expenses of $12,000. No opposition is expressed in this affidavit to such expenses.

3. The aforesaid petition of counsel for the class representatives requests aggregate attorneys fees of $2,500,000. Affiant opposes an award of fees of that magnitude as clearly excessive.

4. The aforesaid petition of counsel for the class representatives sets forth an aggregate of 6233.25 hours as having been expended in all cases in the period 7/1/68 - 4/19/72 with an estimate of 1000 future hours to be spent on these matters. Of the aforesaid 6233.25 hours, 1814.45 are characterized as those of senior attorneys such as David Berger, Esq.; 542.25 of such hours are characterized as those of associate attorneys;

and 3876.55 of such hours as those of "para-professionals".

5. The aforesaid petition of counsel for the class representatives indicates that approximately $310,000,000 of aggregate claims will in all likelihood be accepted. The aggregate Settlement Fund, exclusive of interest earned, is $10,000,000. If attorneys fees of $2,500,000 are allowed to petitioner this would leave only $7,500,000 plus accrued interest available to be distributed pro rata among the approximately $310,000,000 of aggregate claims. Even if no attorneys fees were allowed, the claimants who have been damaged by the wrongful activities of the defendants would receive only approximately 3% of the amounts claimed. Thus there is no possibility under the most favorable circumstances of any appreciable recovery for any of the claimants. In such a situation all efforts should be made to increase the amount available for the claimants, consistent with a fair allowance for the work performed by petitioner's firm. To permit 25% of the Settlement Fund to go to the attorneys would be totally disproportionate.

6. Affiant urges the court to apply an hourly rate to the services performed by the para-professionals in keeping with the standard rates that such persons would be entitled to charge for services of the type performed by them, which should not exceed $25 an hour. With

respect to the associate attorneys, it is urged that an hourly rate should be applied to their services, such rate not to exceed $50. With respect to the services of the senior attorneys, including David Berger, Esq., it is urged that an hourly rate of $100 an hour should be more than adequate. According to such a recommendation the 3876.55 hours of the para-professionals would be recompensed at $96,913.75; the 542.25 hours of the associate attorneys would be recompensed at $27,112.50 and the 1814.45 hours of the senior attorneys would be recompensed at $181,445. or an aggregate award for the 6233.25 hours of work to date of $305,471.25. The additional 1000 estimated future hours could be recompensed at the same rates upon the filing of a supplemental affidavit evidencing the breakdown of those hours as between senior attorneys; associate attorneys and para-professionals, with an additional fund of $75,000 set aside at this time as a reserve to meet the additional fees.

7. Should the court be persuaded that the services of the attorneys for the class representatives have been extraordinarily effective in achieving the settlement then there should be no objection to making some additional award for such extraordinary results, such as $50,000. In view of the low percentage of the

recoveries available to the claimants who were the wronged parties it seems somewhat questionable that a strong argument can be made for an extraordinary result. Thus any allowance for such a result should not be particularly high.

8. Without denigrating the considerable efforts of petitioner's firm, it appears that Philadelphia lawyers have somewhat inflated ideas of the value of legal services.

Further affiant sayeth not.

Sworn to before me this

12th day of May, 1972

Elsie Green

ELSIE GREEN
Notary Public, State of New York
No. 31-3338065
Qualified in New York County
Commission Expires March 30, 1972

TO:

David Berger, Esq.
1622 Locust Street
Philadelphia
Pennsylvania 19103

Messrs. Cahill, Gordon, Sonnett, Reindel & Ohl
80 Pine Street
New York, New York 10005

Clerk, United States District Court
Southern District of New York
Foley Square
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.

-vs-

GRINNELL CORPORATION, et al.

MANHATTAN-WARD, INC., et al.

-vs-

GRINNELL CORPORATION, et al.

1225 VINE STREET BUILDING,
INC., et al.

-vs-

GRINNELL CORPORATION, et al.

AFFIDAVIT IN OPPOSITION
TO PETITION FOR AWARD
OF COUNSEL FEES

68 Civ. 4026

68 Civ. 4027

68 Civ. 4028

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MAX CUTLER, being duly sworn, deposes and says:

I am an attorney at law duly admitted to practice in the State of New York, and a partner in the firm of CUTLER & CUTLER; we are the attorneys of record for CONTAINER CORPORATION OF AMERICA, a member of the "Industrial" class of plaintiffs in the above-entitled action.

This Affidavit is submitted on behalf of CONTAINER CORPORATION OF AMERICA in opposition to the Petition of DANIEL BERGER, P.A. requesting the award of a counsel fee in the sum of $2,500,000.

Although the petitioning attorneys were successful in negotiating the settlement offer, that offer was made at an early stage of the litigation and before there had been any proceedings on the merits of the action or the quantum of damages.

DAVID BERGER's own Affidavit submitted in support of the Petition for Award of Counsel Fees conceded that fewer than 2,500 hours of attorneys' time were devoted to this case, and that of those hours, more than 20% were expended by "junior" attorneys. Even if there had been 2,500 hours devoted by a senior attorney, the requested fee of $2,500,000 would constitute payment at the astronomical rate of $1,000 per hour!

In these circumstances, in spite of the fact that the fee is characterized as "contingent", it is respectfully submitted that a fee equivalent to $1,000 per hour, or $2,500,000, is grossly excessive.

Max Cutler
MAX CUTLER

Sworn to before me this
9th day of May, 1972.

Allan M Seif
Notary Public

ALLAN M. SEIF
Notary Public, State of New York
No. 41-3587360 Queens County
Certificate filed in New York County
Commission Expires March 30, 1973

Filed
U.S. District Court
MAY 12, 1972
S D NY

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.,	:	68 CIV. 4026
v.	:	
GRINNELL CORPORATION, et al.,	:	(E.D.Pa. CIV. 68-1478)
MANHATTAN-WARD, INC., et al.,	:	68 CIV. 4028
v.	:	
GRINNELL CORPORATION, et al.,	:	(E.D.Pa. CIV. 68-1489)
1225 VINE STREET BUILDING, et al.,	:	68 CIV. 4027
v.	:	
GRINNELL CORPORATION, et al.	:	(E.D.Pa. CIV. 68-1479)

TO: DAVID BERGER
1622 Locust Street
Philadelphia, Pennsylvania 19103

ALLEN S. JOSLYN
CAHILL, GORDON, SONNETT, REINDEL & OHL
80 Pine Street
New York, New York 10005

NOTICE OF MOTION FOR AN ORDER SETTING AN EVIDENTIARY HEARING

Notice is hereby given that on the 24th day of May, 1972 at 4:30 p.m., Bay Fair Shopping Center, Friendswood Development Company, Garden State Plaza Corp., Humble Oil & Refining Company, International Lubricant Corporation and Shell Oil Company will bring on for hearing in the Courtroom of the Honorable Charles M. Metzner, Judge of the above-named Court, at the United States Court House in Foley Square, New York, New York, a Motion for an Order setting an evidentiary hearing on the issues raised by the fee petition of Counsel for the Temporary Class Representatives either before this Court, a Magistrate, or a Special Master.

MOTION

Bay Fair Shopping Center, Friendswood Development Company, Garden State Plaza Corp., Humble Oil & Refining Company, International Lubricant Corporation and Shell Oil Company, members of the Temporary Settlement Class, by their undersigned attorneys, hereby move this Court for an Order setting an evidentiary hearing on the fee petition of Counsel for the Temporary Class Representatives, either before this Court, before a Magistrate, or before a Special Master. As grounds for this Motion, these movants assert as follows:

The fee petition of counsel for the Temporary Class Representatives raises substantial issues of fact which can not be resolved on the state of the record now before this Court, and an evidentiary hearing is an essential prerequisite to this Court's resolution of these factual issues.

WHEREFORE, for the foregoing reasons, and for the reasons further stated in these movants' Objections to all fee applications and supporting memorandum which will be filed in this Court on May 12, 1972, these movants hereby move this Court for an Order setting an evidentiary hearing on the factual issues faised by the fee petition of Counsel for the Temporary Class Representatives, either before this Court, a Magistrate, or a Special Master.

Respectfully submitted,

William Simon

WILLIAM SIMON
KEITH E. PUGH, JR.
G. JOSEPH KING

HOWREY, SIMON, BAKER & MURCHISON
1707 H Street, N. W.
Washington, D. C. 20006
(202) 298-6450

Dated: May 12, 1972

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.,	:	68 CIV. 4026
v.	:	
GRINNELL CORPORATION, et al.,	:	(E.D.Pa. CIV. 68-1478)
MANHATTAN-WARD, INC., et al.,	:	68 CIV. 4028
v.	:	
GRINNELL CORPORATION, et al.,	:	(E.D.Pa. CIV. 68-1489)
1225 VINE STREET BUILDING, et al.,	:	68 CIV. 4027
v.	:	
GRINNELL CORPORATION, et al.	:	(E.D.Pa. CIV. 68-1479)

ORDER

This Court having heard argument on the Motion of Bay Fair Shopping Center, Friendswood Development Company, Garden State Plaza Corp., Humble Oil & Refining Company, International Lubricant Corporation and Shell Oil Company, for an Order setting an evidentiary hearing on the factual issues raised by the fee petition of Counsel for a Temporary Class Representative, and it appearing that there is good cause for this Motion,

IT IS ORDERED this day of May, 1972, that this matter be set for an evidentiary hearing before at o'clock, June , 1972.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I have this tenth day of May, 1972, served a copy of the foregoing Notice of Motion and Motion for an evidentiary hearing upon David Berger, Esquire, 1622 Locust Street, Philadelphia, Pennsylvania, 19103, and Allen S. Joslyn, Esquire, Cahill, Gordon, Sonnett, Reindel & Ohl, 80 Pine Street, New York, New York, 10005, by United States Mail, postage prepaid.

G. Joseph King

G. JOSEPH KING

U.S. District Court
Filed
MAY 15 1972
S.D. of N.Y.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.,	68 CIV. 4026
v.	
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v.	
GRINNELL CORPORATION, et al.	(E.D.Pa. CIV. 68-1479)

NOTICE OF INTENTION TO APPEAR

Counsel for Bay Fair Shopping Center, Friendswood Development Company, Garden State Plaza Corp., Humble Oil & Refining Company, International Lubricant Corporation and Shell Oil Company hereby gives notice of their intention to appear at the hearing scheduled before this Court at 4:30 p.m. on May 24, 1972 for the purpose of objecting to all petitions for counsel fees and costs.

Respectfully submitted,

WILLIAM SIMON
G. JOSEPH KING

HOWREY, SIMON, BAKER & MURCHISON
1707 H Street, N. W.
Washington, D. C. 20006
(202) 298-6450

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1225 VINE STREET BUILDING, et al., : 68 CIV. [illegible]27

v.

GRINNELL CORPORATION, et al. : (E.D. Pa. CIV. 68-1479)

OBJECTIONS OF BAY FAIR SHOPPING CENTER, FRIENDSWOOD DEVELOPMENT COMPANY, GARDEN STATE PLAZA CORP., HUMBLE OIL & REFINING COMPANY, INTERNATIONAL LUBRICANT CORPORATION AND SHELL OIL COMPANY TO ALL APPLICATIONS FOR COUNSEL FEES AND COSTS

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I.

INTRODUCTION

In this private treble damage action brought pursuant to Section 4 of the Clayton Act (15 U.S.C. 15), and treated as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure temporarily and for settlement purposes only, defendants and the attorney for the named plaintiffs have agreed to a settlement producing a Settlement Fund of $10 million. These objections are filed against a petition seeking an allowance of $2.5 million in attorneys' fees from this Fund in a case in which very little work was done by the petitioning attorney and in which defendants' liability to the claimants had been established by the Supreme Court in a prior government case.[1/]

Bay Fair Shopping Center, Friendswood Development Company, Garden State Plaza Corp., Humble Oil & Refining Company, International Lubricant Corporation, and Shell Oil Company (hereinafter "Objectors") have filed claims which have been allowed, and are therefore members of the temporary class for settlement purposes. Thus, these claimants have a substantial interest in the matters pending before this Court in that the fees sought by Counsel for the Temporary Class Representatives will result in a reduction of the recoveries from the Settlement Fund of all class members; also, any fees allowed to other counsel seeking fees out of the Fund will similarly reduce the recoveries of all claimants.

In the course of administering the settlement, this Court approved Settlement Order No. 1 without having had the views of non-plaintiff claimants, whom Counsel for the Temporary Class Representatives now purports to represent, or of counsel who do not seek an award of fees from the Settlement Fund which

---

[1/] United States v. Grinnell Corp., 384 U.S. 563 (1966).

is before this Court. In fact, this Order was entered without notice to these claimants. The undersigned counsel have entered their appearance in behalf of these claimants pursuant to this Court's Legal Notice to potential class members and Rule 23(c)(2)(C) of the Federal Rules of Civil Procedure. This Memorandum expresses their views and objections.

II.

STATEMENT OF THE CASE

These Objectors respectfully submit that the fee petition of Counsel for the Temporary Class Representatives raises serious questions for decision by this Court concerning the allowance of attorneys' fees in private antitrust cases settled under Rule 23 of the Federal Rules of Civil Procedure, questions which have not been answered by prior decisions. The contentions of these Objectors are summarized for the Court's convenience, as follows:

1. It is not possible on the state of this record to determine the fees which Counsel for the Temporary Class Representatives either will or should receive in this case. Therefore, these Objectors have filed a separate motion for an order setting an evidentiary hearing either before this Court, before a Magistrate, or before a Special Master. Such a hearing should be preceded by limited discovery.

2. Even if, in arguendo, the only fees which will be received by Counsel for the Temporary Class Representatives will be the $2.5 million which this Court has been asked to award, and Counsel for the Temporary Class Representatives did expend 2,356 hours of legal services in the class' behalf as claimed--although these Objectors believe that an evidentiary hearing will show that this is not the case--the resultant mixed

fee[1] of over $1,000 an hour is so excessive that no court of equity could grant the fee petition of Counsel for the Temporary Class Representatives.

3. In ruling on the fee petition of Counsel for the Class Representatives, this Court sits in equity and cannot award fees under Section 4 of the Clayton Act because plaintiffs did not obtain a judgment. However, Section 4 fee cases, in which fees are awarded after a judgment has been won and in which the fees are assessed against the defendant, prescribe the outer limits of what a court of equity can award in this case: This case was settled at a uniquely early stage rather than tried to judgment; this case followed in the wake of and tracked extensive government litigation which paved the way for these private antitrust actions; and, whatever fees the Court awards here will be assessed not against defendants, but against class members.

4. Assessing fees of over $1,000 an hour here against class members would not only be inequitable, but will not serve as a deterrent to violations of the antitrust laws. Moreover, unlike fee awards to plaintiffs under Section 4 of the Clayton Act, awarding excessive fees to plaintiffs' Counsel does not encourage private enforcement of the antitrust laws, or encourage persons wrongfully injured in their business or property to file suits. No fee award is sought here on behalf of any plaintiff.

5. Any fees assessed here against class members will not merely reduce the class members' "windfalls" because there was no treble damage recovery in this case and thus no windfall.

---

[1] The term "mixed fee" is used herein to mean an hourly fee for both senior and junior attorneys' time; thus, if a reasonable fee for a senior attorney's time is $100 per hour, and $50 per hour for a junior attorney's time, the mixed fee would be $75 per hour assuming both expended equal amounts of time, or $66.67 per hour if juniors spent twice as much time as the senior attorney.

To the contrary, the class members' recoveries from the Settlement Fund represent only a partial recoupment of the illegal overcharges they paid. In no sense can the class members' partial recoveries of their overcharges from the Settlement Fund be considered "windfalls". However, Counsel for the Temporary Class Representatives has entered into fee contracts to prosecute this case only with his retained clients. Any additional fees which this Court awards to Counsel for the Temporary Class Representatives over and above those fees which his clients are contractually obligated to pay will indeed constitute "windfall" fees of an enourmous magnitude.

6. Rule 23 envisions that in certain proper cases "economics of litigation" can be achieved by allowing persons with similar interests, large and small alike, to have their claims adjudicated in one suit. Rule 23 envisions that the actual cost of the litigation incurred by the plaintiff will be allocated and shared by the class, not artificially inflated by multiplying the actual cost by the number of class members. Granting the fee petition of Counsel for the Temporary Class Representatives will neither relieve the fee burden of plaintiffs in this case, nor achieve the intended purpose of Rule 23 in that if the fee petition is granted, a 25% contingent fee will be impressed on each class member. Granting the fee petition of Counsel for the Temporary Class Representatives will not achieve the economies intended by Rule 23, it will merely make the practice of law more lucrative: It will allow an attorney to do work for one or a few clients, as is here the case, and to charge some 14,000 class members separately for the same quantum of work.

7. Similarly, the equitable "fund theory" doctrine is intended to relieve a plaintiff--a litigant--of the burden of bearing himself the entire expenses (including reasonable

attorneys' fees) of creating a fund from which others will share. Just as granting the fee application of Counsel for the Temporary Class Representatives will not achieve the economics of litigation intended by Rule 23, granting the fee petition will not relieve the fee burden on the named plaintiffs in this case. The fund theory doctrine does not authorize this Court to impress on each member of the class by judicial fiat the contingent fee contracts voluntarily entered into between his retained clients and Counsel for the Temporary Class Representatives.

8. It is not inequitable to deny the petition of Counsel for the Temporary Class Representatives, for he has private fee contracts with his retained clients which it must be assumed were in his judgment sufficient inducement for him to bring this case. When these suits were filed, there was no certainty that they would either be maintained by the Court as class actions or settled as class actions. Moreover, it will not be inequitable to his retained clients to deny the fee petition, for they have not petitioned this Court to have their expenses spread over the Fund under the fund theory doctrine. Granting the fee petition will not relieve their burden, but to the contrary, will create an inequity by assessing duplicative and unconscionable fees against the class members.

9. Contingent fee contracts providing for an attorney to receive a percentage of his client's recovery are only proper in cases in which the attorney undertakes some risk in the client's behalf. We do not believe that Counsel for the Temporary Class Representatives undertook any risk in behalf of his retained clients because the Supreme Court had already established defendants' liability.

10. Certainly, however, Counsel for the Temporary Class Representatives undertook no risk in behalf of the class. This Court has never determined that these suits can be maintained

as class actions. When on December 13, 1971, he was named Counsel for the Temporary Class Representatives for settlement purposes only, the cases had already been settled with the defendants. No risk having been undertaken in the class' behalf, it would be improper for this Court to award Counsel for the Temporary Class Representatives fees based on any percentage of the Settlement Fund, much less 25%.

11. A fund must bear the expense of its own administration, and if Counsel for the Temporary Class Representatives were eligible for an award of fees from this Fund, this Court could award fees only on a *quantum merit* basis, at a fair and reasonable hourly rate for the legal services performed *in the class' behalf* subsequent to December 13, 1971. We submit that any such legal services expended and benefit conferred were *de minimis*, as will be shown by the evidentiary hearing.

12. Counsel for the Temporary Class Representatives has a disabling conflict of interest which makes it inappropriate for a court of equity to award him any fee out of the Settlement Fund.

13. Apparently, attorneys other than Counsel for the Temporary Class Representatives seek a fee from the Settlement Fund, although there is no showing that they represent any client having any interest in the Fund. Certainly, a court of equity cannot award a fee from the Fund to an attorney who represented parties in other cases, the prosecution of which may have had an incidental spill-over effect on these cases.

We recognize the tendency of every court to lean toward disposing of pending cases as quickly as possible, and this is particularly so where a settlement has been proposed. Moreover, we appreciate that, as Chief Judge Major said for a unanimous panel of the United States Court of Appeals for the Seventh Circuit in *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561, 569 (1951), cert. denied, 342 U.S. 909 (1952), the issue of awarding attorneys' fees is a "delicate, embarrassing and disturbing controversy." We recognize, too, that this Court will be told repeatedly that generous fees must be awarded to encourage the private enforcement of the antitrust laws; but "generous" fees does not mean compensation at an annual rate of almost $2 million for the service of one lawyer. Moreover, this Court cannot sweep aside the interests of the claimants on the ground that their interests in the Fund constitute a windfall. On this record, it is clear that their recoveries from the Settlement Fund represent merely a partial return of overcharges--overcharges which were proved in extensive government litigation which preceded these treble damage actions.

Furthermore, because the civil judicial system exists for the benefit of the litigants, not for the purpose of promoting the private financial interests of attorneys, there is a substantial public interest in assuring that this Court will not allow the Settlement Fund to be unjustly dissipated or impaired. Thus, the Manual for Complex and Multidistrict Litigation (as revised May 18, 1970) states, in pertinent part:

> 1.11 Control of Attorneys' Fees and Expenses in Class Actions.
>
> The great potential of the class action for speed and efficiency in the administration of justice is attended with equally great potential for unreasonable charges for attorneys' fees and expenses and for the improper solicitation of legal representation. (Emphasis supplied; at 55.)

Since the last revised edition of the Manual for Complex and Multidistrict Litigation has been published, a new draft dated February 1972 was circulated among members of the bench and bar for their criticism. The reasoning of this draft is both persuasive and, we submit, indicative of the great current concern over the award of unreasonable attorneys' fees by some courts in the past in class action suits. For the Court's convenience, we provide the following excerpts from the revised draft:

> 1.41 **Preventing Potential Abuse of Class Action**
>
> The class action under Rule 23 is subject to abuse, intentional and inadvertent, unless procedures are devised and implemented to anticipate abuse. (At 21.)
>
> * * *
>
> 1.46 **Settlement of Class Actions**
>
> No settlement of any class action...should be permitted or approved by a court without full disclosure of the details of the settlement and attorneys' fees and other expenses to be charged against the members of the class.... (At 36.)
>
> * * *
>
> 1.47 **Control of Attorneys' Fees and Expenses in Class Actions**
>
> * * *
>
> *If the action is concluded by settlement, the court should require a statement of all proposed charges for fees and expenses by the counsel for the class and any subclasses, including the identity of all counsel sharing in the fees. Only reasonable charges for fees and expenses should be authorized upon approval by the court after notice and hearing. All other such charges should be expressly forbidden by court order.* (Emphasis supplied; at 40-41.)
>
> *Recent experience in national class actions has raised serious questions concerning the standards to be employed for the allowance of fees of counsel representing classes, particularly where settlements have been proposed or effected.* The problem typically is raised by an application by counsel representing a class or a subclass in which a settlement has been effected, and in which counsel was employed by the representative parties under a contingent fee contract. In these circumstances, *the court is not concluded by the contingent fee contract in respect to the fee to be charged to the other members of the class* even though the contingent fee contract is otherwise reasonable and ethical in respect to the formal party or parties originally represented by counsel. In this regard, *the standards for the allowance of fees for services rendered to the members of the class are different from the standards which apply to the collection and allowance of fees between counsel and an individual party capable of contracting for the payment of attorneys' fees.*

> It is concluded that, in addition to the standards for charging and collecting fees for legal services set forth in the Code of Professional Responsibility of the American Bar Association effective in 1970, *standards applicable to the charging, collecting, and allowance by a court of fees for services rendered to a class formed under amended Rule 23 should be developed.* (Footnote omitted.)
>
> * * *
>
> *Once adequate compensation sufficient to provide the motive for representation of classes is provided, no further incentive is required.* In this connection, while any fee allowed in the case of a settlement or recovery through litigation may constitute a percentage of the total amount recovered, *the reasonableness of the fee arrived at should not rest primarily on the selection of a percentage of the total recovery.* Although the results obtained in representing the class should be given consideration as provided in the Code of Professional Responsibility, there should also be *an emphasis upon the time and labor required and the effect of the allowance on the public interest and the reputation of the courts.* *In no event should representation of a judicially determined class be allowed on the same basis as in a contingent fee contract between competent contracting counsel and client.* (Emphasis supplied; at 41-43.)

In response to current criticism of unconscionable fees of lawyers, the Supreme Court of New Jersey issued a Rule effective January 31, 1972, governing the maximum contingency fee arrangements that may be exacted by members of the Bar of that State practicing in both the courts of New Jersey and the United States District Court for the District of New Jersey. Rule 1:21-7(c) reads, in pertinent part:

> *In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, ...an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:*
>
> * * *
>
> (5) *10% on any amount recovered over $100,000*.... (Emphasis in original.)

We suggest that the fact that the New Jersey Supreme Court felt compelled to issue such a rule demonstrates that unreasonable attorneys' fees are matters of grave public concern.

Generally, in class action settlements, the claimants--particularly where there are a large number of relatively small claims--or counsel who do not seek fees from the Settlement Fund, have not expressed their views to the courts on the settlement procedures or on applications for unreasonable attorneys' fees that will materially diminish the class members' recoveries. This is one of the prime reasons why the revisers of the Manual for Complex and Multidistrict Litigation found that recent class action experience has "raised serious questions concerning the standards to be employed for the allowance of fees of counsel representing classes," and why the courts have not resolved the issues arising from the interrelationship of Rule 23 and the private treble damage provisions of the Clayton Act. And, as in this case, it is unlikely that the defendants will take any position on Counsel for the Temporary Class Representatives' fee application. Thus, in the past, courts have granted fee petitions which have resulted in unconscionable fee awards.

Because frequently only plaintiff's counsel have expressed self-serving views to the Court--because the fee issue has not been "litigated" in an adversary sense--prior decisions have not met these issues or adequately answered the problems raised by counsel fee applications such as the one before the Court. If granted, the unconscionable fees sought here would not only result in the unjust enrichment of Counsel for the Temporary Class Representatives but in the dissipation of and unjust impairment of the Settlement Fund at the expense of the class members, the very people Counsel claims to represent. Of course, the private financial interest of Counsel for the Temporary Class Representatives is antagonistic to the class' interest, and he cannot speak for the class on these issues.

III.

AN EVIDENTIARY HEARING IS ESSENTIAL

There is insufficient evidence in this record for the Court to make a determination on the fee petitions pending before it, and an evidentiary hearing is essential. In *Perkins v. Standard Oil Co.*, 399 U.S. 222, at 223 (1970), a private antitrust case, the Supreme Court stated:

> The amount of the award [of counsel fees] for ... [legal] services should, as a general rule, be fixed in the first instance by the District Court, *after hearing evidence as to the extent and nature of the services rendered*. (Emphasis supplied.)

Hence, these Objectors have submitted separately a motion for an order setting an evidentiary hearing on the factual issues raised by the fee petition of Counsel for the Temporary Class Representatives, either before this Court, a Magistrate, or a Special Master.

In other private antitrust litigation now pending in the United States District Court for the Eastern District of Pennsylvania, the *Plumbing Fixtures* cases,[1] Counsel for the Temporary Class Representatives, who include Counsel for the Temporary Class in this case, also filed a petition for fees. In *Plumbing Fixtures*, in addition to the huge fees of $3.5 million which Counsel sought to have the Court award out of the Settlement Fund, the fee petition and amendments thereto show that Counsel for the Temporary Class Representatives will also collect in excess of $800,000 pursuant to private contingency fee contracts with their retained clients.

In this case, Counsel for the Temporary Class Representatives has not revealed the amount of fees which he will collect pursuant to private fee arrangements with his retained clients for performing the same legal services for which he also seeks an award of fees from this Court out of the Settlement Fund. However, it is fair to assume that just as in the Plumbing Fixtures case, in addition to the fees sought by Counsel for the Temporary Class Representatives in this case from the Settlement Fund, Counsel will also receive additional substantial fees from his retained clients. Similarly, that record shows that counsel in that case will share their fees with others. These facts are not shown in this record and must be in the record before this Court can properly pass on the pending fee applications.

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[1] *Lindy Bros. Builders, Inc. of Phila., et al. v. American Radiator and Standard Sanitary Corp., et al.*, Civil Action No. 41774 SC.

Moreover, we believe that discovery and an evidentiary hearing will show that in addition to the plaintiffs in this case, Counsel for the Temporary Class Representatives has clients who are non-plaintiff class members, from whom he will also receive fees which are now undisclosed. The affidavit of Ralph Lynch, Jr., the City Solicitor of Pittsburgh, Pennsylvania, filed in support of Counsel for the Temproary Class Representatives' fee application "... expressly approves the allowance of a 25% fee to Petitioner out of the City's share of settlement proceeds and supports the petition for similar fees from the class settlement fund generally." (¶ 8.)

It would be strange for a Government officer to approve the unconscionable fees sought here unless his municipality was already obligated to pay a 25% fee to Counsel for the Temporary Class Representatives. If that is so, then this affidavit "approving" the petition for a 25% fee of the City of Pittsburgh's recovery is of no moment and does not lend support to the fee petition.[1/]

1/ Similarly, the affidavit of A. R. Seitell, President of [footnote continued on next page]

In addition, a newspaper article on page 1 of the February 1, 1972, Philadelphia Inquirer (attached hereto as Exhibit A) describes the private fee arrangement which Counsel for the Temporary Class Representatives has with the City of Philadelphia, a plaintiff herein. An article from the February 3, 1972, Inquirer, page 21 (attached as Exhibit B) suggests that this client is not satisfied with this fee arrangement. The Mayor of Philadelphia has apparently decided that Counsel's fees are excessive, is canceling the City's fee contract with Counsel, and is hiring a Deputy City Solicitor at $24,000 a year to handle future antitrust matters for the City. Not only does this demonstrate that at least one named plaintiff, Counsel's retained client, objects to this fee, but it further suggests that the City of Philadelphia believes antitrust claims can be adequately enforced by a $24,000-a-year Deputy Solicitor. We recognize that this Court cannot decide this case on the basis of newspaper articles. Nonetheless, they do demonstrate that this Court cannot decide this $2.5 million claim without an evidentiary hearing.

Also, there is no evidence in the record as to the amount of time expended by Counsel for the Temporary Class Representatives in negotiating fee arrangements with his retained clients or in collecting data for, or filling out, the claim forms by Counsel for both his named plaintiff clients and non-

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Drexel Dynamics Corporation, a class representative of the industrial class, states that while Counsel for the Temporary Class Representatives had a 33 1/3% contingent fee arrangement with Drexel, Counsel will reduce his fee to apparently whatever portion of the Fund the Court awards to Counsel. Of course, this affidavit is self-serving since Drexel already has a 33 1/3% fee contract with Counsel, and does not lend support to the fee application. Moreover, it raises the question as to whether Counsel also has a 33 1/3% fee arrangement with other clients.

Also, we note that no affidavit was submitted by any member of the commercial class in support of Counsel's fee petition.

plaintiff clients in this case, matters which cannot possibly have produced any benefit for the class. Moreover, there is no evidence in this record to show whether Counsel for the Temporary Class Representatives has fee arrangements with any other counsel who forwarded clients to him, or whether any of the fees sought from this Court will be shared with any other counsel not of record, matters which, according to the revised draft in the Multidistrict Manual, heretofore quoted, must be inquired into by this Court.

Paragraph 10 of Mr. Berger's affidavit submitted in support of the fee petition of Counsel for the Temporary Class Representatives states that his firm expended 6,233 hours on this litigation. However, of this total amount of time, only 2,356 hours represents time of attorneys, 1,814 hours of senior attorneys' time and 542 hours of junior attorneys'. The remaining 3,877 hours expended on this case by petitioner's firm was spent by non-attorneys which he calls "para-professionals."

Certainly, petitioner cannot seek attorneys' fees from this Court for the time of non-attorneys, whether he calls them clerks, secretaries, or para-professionals.[1/] The most that Counsel for the Temporary Class Representatives is entitled to claim for the time expended by his non-legal staff is reimbursement for his expenditure in employing that clerical or non-attorney staff.

In view of the $2.5 million fee sought from the Court, the 2,356 hours of attorneys' time claimed to have been spent on this case, not quite 1 1/2 man-years, result in a mixed fee of over $1,000 an hour. However, the papers submitted by Counsel for the Temporary Class Represntatives in support of his fee

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[1/] In determining a fee in Trans World Airlines v. Hughes, 312 F. Supp. 478 (S.D.N.Y. 1970), aff'd, 1971 Trade Cases ¶ 73,690 (2nd Cir. 1971), this Court exlcuded the hours of persons not members of the bar. (At 482.)

application do not reveal how this time was calculated, whether he recorded this time on the basis of a 5 1/2- or 7-hour day, or whether he regularly charged 12, 14, or 16 hours per day to this case. In Paragraph 40 of Mr. Berger's affidavit, in commenting on the hours purportedly expended on this case, he states as follows: "Many of these hours have been odd, i.e., evenings and weekends." Thus, we believe that an evidentiary hearing is necessary to show the total number of hours which Counsel in fact expended on this case as well as the nature of the work done in that time to know whether it even remotely benefitted the class. In determining a fee in an antitrust case, Milwaukee Towne, supra, Chief Judge Major determined that awarding counsel fees in a litigated case on the basis of 5 hours a day, for the time spent during the trial of the case, was reasoable. An evidentiary hearing had been held on the fee question, and the Court wrote:

> There is evidence in the record developed on cross-examination that experienced trial attorneys competent to handle major trial work can be employed in Chicago for $200.00 per day ($40.00 per hour for a five-hour day) and that the common charge for assistants such as McConnell was $20.00 per hour. On this basis, which is the most persuasive to be found in the record, plaintiff was entitled, so we held, to an allowance of not more than $75,000.... (Emphasis supplied; at 571.)

Moreover, of the 2,356 hours which Counsel for the Temporary Class Representatives claims were spent on this case by attorneys, we suggest an evidentiary hearing will probably show that a substantial number of these hours were spent purely in ministerial tasks, administering the Settlement Fund, and in processing claims forms. Also, we respectfully submit that this Court abdicated part of its judicial responsibilities in this case by delegating to the Class Action Committee tasks which should have been carried out by the Office of the Clerk of the Court.

We further suggest that an evidentiary hearing will also show that of the 2,356 hours which Counsel for the Temporary Class Representatives claims were expended in legal services devoted to this case, a substantial number of these hours were spent in his retained clients' behalf prior to December 13, 1971, the date plaintiffs herein were named Temporary Class Representatives for settlement purposes only.

We further respectfully submit that an evidentiary hearing will show that a substantial portion of the hours expended by Counsel for the Temporary Class Representatives subsequent to December 13, 1971, were spent in preparing and attempting to justify his fee petition, a matter which does not benefit the class but rather is contrary to the class' interests.

We know of our own knowledge, for this firm is counsel for plaintiffs in R. H. Macy & Co., Inc. v. Grinnell Corp., et al., Civil Action No. 67-2258, filed in this Court on June 9, 1967, prior to the running of the statute of limitations, that comparatively no discovery or litigation has been carried on in this case, much less by Counsel. However, Counsel for the Temporary Class Representatives cites in his papers the length of his briefs on the few issues which were briefed in this case. Thus, Paragraph 13 of Mr. Berger's affidavit states:

> Petitioner initially submitted an extensive brief (46 pages) in support of the class action.... Petitioner then filed an extensive reply brief (40 pages) in addition to Petitioner's affidavit.

If the number of pages in his brief is the way in which Counsel for the Temporary Class Representatives feels his fee petition should be evaluated, we point out that in his effort to justify his petition for unreasonable fees, his brief was 69 pages and his affidavit 29 pages--a total of 98 pages, even more substantial in physical weight than his class action brief.

Hence, using petitioner's page-counting method as a guide, we venture to say that of those hours truly constituting legal services expended on any particular project subsequent to December 13, 1971, when plaintiffs herein became the Temporary Class Representatives, the majority of those hours were spent by petitioner in an attempt to justify his fee application. Clearly, Counsel is not entitled to fees from the class for his attempts to justify his petition for excessive fees from the Settlement Fund.

We respectfully submit that an evidentiary hearing will show that the legal services expended in the class' behalf by Counsel for the Temporary Class Representatives, and any benefit conferred thereby, were de minimis.

IV.

SECTION 4 OF THE CLAYTON ACT AND FEE AWARDS IN RULE 23 SETTLEMENTS

When Congress entrusted to the Supreme Court "...the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts...", Congress expressly provided that the rules promulgated by the Court "...shall not abridge, enlarge or modify any substantive right...." (28 U.S.C. 2072.) Thus, Rule 23 is purely a procedural device and in promulgating the Rule no substantive changes were made in existing law pertaining to such matters as awards of attorneys' fees.

Section 4 of the Clayton Act[1] contains the treble damage provisions of the antitrust laws pursuant to which the actions

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[1] Section 4 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue there-

[footnote continued on next page]

pending before this Court were brought. It provides for an allowance of reasonable attorney's fees to a plaintiff who has recovered a judgment against a defendant after establishing a violation of the antitrust laws, showing proof of damage or the "fact of injury", and establishing the amount of his damages. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946); Story Parchment Co. v. Patterson Co., 282 U.S. 555 (1931).

However, fees can be awarded under Section 4 of the Clayton Act only to a successful plaintiff who recovers a judgment. Byram Concretanks, Inc. v. Warren Concrete Prod. Co. of N.J., 374 F.2d 649 (3rd Cir. 1967). Thus, in ruling on a petition seeking an award of fees from a settlement fund in an antitrust class action in Philadelphia Electric Co. v. Anaconda American Brass Co., 47 F.R.D. 557, 558 (E.D. Pa. 1969), the Court clearly stated:

> This is not a petition to fix the statutory attorney's fee authorized by Section 4 of the Clayton Act, 15 U.S.C. § 15, to be assessed against the defendants in addition to treble damages.... Neither is it a petition for approval of the contingent-fee agreements already entered into.... (Citations omitted.)

Therefore, in passing on the fee and cost applications now pending, this Court sits in equity and must look to the equitable "fund theory doctrine" approved by the Supreme Court in Trustees v. Greenough, 105 U.S. 527 (1882). In commenting on the "fund theory," Professor Moore recognized that it stands for the proposition that if a litigant, a party, engages counsel and commences suit, the result of which is the creation or preservation of a fund from which others as well as the litigant will

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> for in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (15 U.S.C. 15.)

benefit, it is equitable for the litigant's reasonable expenses, including attorneys' fees, to be assessed against the fund if the litigant so petitions. Thus, Professor Moore stated:

> Where a person has taken upon himself the protection of a fund ... or has created a fund in which others have a beneficial interest, it is only fair that such a person should be reimbursed for his reasonable expenses, including attorney's fees, and the court will, therefore, normally reimburse the 'protector' of the fund from the fund itself or by some kindred equitable arrangement. (Emphasis supplied; footnote omitted.) 6 Federal Practice, ¶ 54.77[2], at 1349.

Applying the principle directly to class actions, Professor Moore writes as follows:

> The principles governing the allowance of attorney's fees in class actions are, for the most part, court evolved, though in some instances they may derive from court rule or statute. The basis generally lies in the equitable power of the Court.
>
> The most common case is where the plaintiff-representative in a class action is successful in protecting a fund or property, or has created a fund in which others have a beneficial interest. In such a circumstance it is well established that the representative may recover attorney's fees and other reasonable expenses of litigation. (Emphasis supplied.) 3B Federal Practice, ¶ 23.91 at 23-1701.

Before turning to a discussion of the equitable fund theory doctrine, we point out some general principles governing the relationship of fees awarded under Section 4 of the Clayton Act and Rule 23. First and foremost is the principle that an antitrust claim is the litigant's cause of action and not his attorney's, as was succinctly stated by the United States Court of Appeals for the Eighth Circuit in First Iowa Hydro Electric Co-Op v. Iowa-Illinois Gas & Electric Co., 245 F.2d 630, 632 (1957):

> The provisions of the Clayton Act (15 U.S.C. § 15) provide for recovery of an attorney fee in addition to treble

> damages but the right accrues to the party injured and not to his attorney. 32 West Randolph Corporation v. Blackman, 7 Cir., 222 F.2d 54; Strickland v. Sellers, D.C. Texas, 78 F. Supp. 274.

Likewise, more recently, Judge Gibbons, in Hackett v. General Host, 1972 Trade Cases, ¶ 73,800 (3rd Cir.), made clear that a treble damage suit is the litigant's cause of action and not his attorney's. Also, of course, where courts do award fees to successful plaintiffs under Section 4 of the Clayton Act, these fees are assessed against defendants and not against class members.

While the cases awarding fees under Section 4 of the Clayton Act are not controlling here, because no judgment has been recovered against the defendants, they clearly set forth the criteria for the maximum possible fee that can be awarded here. This is necessarily so because an attorney cannot be allowed as large a fee in a case he has settled as he would be entitled to in a case he tried and won. This is particularly so here because plaintiffs' counsel had the benefit of the prior government litigation, which established defendants' liability, and this case was settled at a uniquely early stage, before any real discovery in this case and long before trial.

The outer limits of permissible fee allowance are reflected in two recent cases: This Court's decision in Hughes and Hanover Shoe in the Third Circuit.

Trans World Airlines, Inc. v. Hughes, supra, involved the largest antitrust judgment in history, single damages of $45,870,478 and a treble damage judgment of over $135 million. It did not follow a government case. It was tried to final judgment. It included twenty-one pretrial hearings, three appeals, arguments to the Supreme Court on two petitions for certiorari, and lengthy hearings before a special master. The fees allowed represented $125 an hour for lawyer's time, or less than 6%

of the recovery--even though the case was fully litigated and did not follow in the wake of a successful government case.

In Hanover Shoe, Inc. v. United Shoe Machinery Corp., 245 F. Supp. 258 (M.D. Pa. 1965), rev'd on other grounds, 377 F.2d 776 (3rd Cir. 1967), aff'd in part and rev'd in part, 392 U.S. 481 (1968), the District Court assumed that associate time was worth half as much as partner time, and it made an award of $74 an hour for partners' time and $37 an hour for associates' time. Assuming an equal mix of partners' and associates' time, this is $55 an hour, and assuming a 2-to-1 mix in favor of associates' time, this is $49 an hour.

Hourly rates awarded by other courts in antitrust cases tried to judgment have ranged from $10.12 in Advance Business Systems & Supply Co. v. SCM Corporation, 415 F.2d 55, 70 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970), to a mix of $85 per hour allowed by the district court in Perkins v. Standard Oil Co., supra; appeal has been taken from that award as excessive and is now pending before the Court of Appeals for the Ninth Circuit.[1]

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[1] Hourly rates in other antitrust cases have been as follows:

A. C. Becken Co. v. Gemex Corporation, 314 F.2d 839, 844 (7th Cir), cert. denied, 375 U.S. 816 (1963)	$29.17
Bal Theatre Corp. v. Paramount Film Distributing Corp., 206 F. Supp. 708, 718 (N.D. Cal. 1962)	$33.44
Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61, 86, 91 (1st Cir. 1970)	$33.44
Milwaukee Towne, supra	$31.40
Noerr Motor Freight v. Eastern Railroad Pres. Conf., 166 F. Supp. 163, 179 (E.D. Pa. 1958), rev'd on other grounds, 365 U.S. 127 (1961)	$43.47
Union Leader Corp. v. Newspapers of New England, Inc., 218 F. Supp. 490, 493 (D. Mass. 1963)	$38.86

The fees awarded here can have no deterrent effect against violations of the antitrust laws because these fees will be paid by the injured claimants. Moreover, as the Court stated in First Iowa Hydro-Electric, supra, the right to an attorney's fee under Section 4 is the litigant's, not the attorney's. Congress has decided that injured parties should be encouraged to bring private antitrust suits, not attorneys. Granting excessive fees here to Counsel for the Temporary Class Representatives, and assessing them against class members, will not encourage wronged parties to bring antitrust suits. Any argument that awarding unreasonable fees in this case will have a therapeutic effect is unfounded.

Finally, we refer to another case involving fees awarded under Section 4 of the Clayton Act. Rather than losing its significance in evaluating the reasonableness of fees to be assessed here against the class, the admonition of the Court of Appeals for the Seventh Circuit in Milwaukee Towne, supra, takes on an added significance for this court of equity:

> We said in the beginning that the question was delicate and embarrassing and this is so not only because we recognize the ability of the attorney who rendered the services but also because of the high standing and character of the three lawyers who testified in support of the allowance. 1/ And we might also add this is so because of our respect for the ability and integrity of Judge Barnes, who fixed the allowance. Notwithstanding, the fabulous amount allowed is shocking to our sense of reason and justice. The amount, for instance, would equal the total compensation received for a period of fifteen years by the distinguished judge who made the allowance (present salary). It would more than equal the total annual compensation received by all the district judges of this Circuit. And it would substantially equal the total annual salary received by all members of the Supreme Court of the United States, including the Chief Justice.

1/ Obviously, the court below had held a hearing as an aid in determining the amount of attorney's fee to award. (Footnote not in original.)

> We do not refer to these salaries which Congress has determined as reasonable compensation for members of the judiciary as a yardstick in determining 'a reasonable attorney's fee' in the instant matter, but for the purpose of emphasizing by comparison the magnitude of the allowance.
>
> *And we are disturbed because in our sober judgment this exorbitant allowance, if it should become a precedent, is calculated to bring both the bar and the bench into public disrepute. More than that, the possibility that the anti-trust laws might develop into a racketeering practice should not be enhanced by the allowance of exorbitant and unreasonable attorney fees*. (Emphasis supplied; at 569-570).

We, too, do not suggest that the salaries of Government officers should be a limitation on attorney's fees, but updating the data relied on by the Court in *Milwaukee Towne* for purposes of comparison is helpful here also in demonstrating the patent unreasonableness of the fees sought by Counsel for the Temporary Class Representatives. Currently, the salaries of all of the active status District Court Judges in the four districts of the State of New York, all the Judges of the Second Circuit Court of Appeals, and all the Justices of the Supreme Court, almost 60 members of the bench in all, aggregate approximately $2.5 million a year, the amount sought in fees by Counsel for the Temporary Class Representatives for the early settlement of this one case alone. In addition, the entire budget of the Antitrust Division of the Department of Justice for fiscal year 1972 is $12.1 million. "Workload Statistics" for the Division for 1972 estimates that the budget will be spread over 107 antitrust cases, 150 "kindred law cases," and 683 investigations. Taking the 107 antitrust cases only, that means that the Division will expend an average of $113,000 per case.[1] And, of course, as is true in this case, the Government often does, and did here, the bulk of the investigative and ground work relied on by plaintiff's counsel in settling this private antitrust litigation. Indeed, without the prior Government litigation here, it is extremely doubtful that there would have been any case to settle.

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[1] *Hearings Before a Subcommittee of the House Committee on Appropriations*, Part 1, pages 1171 and 1183 (92nd Cong., 1st Sess.). The information on page 1171 reflects that the Division's budget for 1972 is only $11,056,000. However, because of a general pay increase, the budget has been increased to $12,060,000.

Moreover, an award of fees to plaintiffs' counsel of over $1,000 per hour, such as that sought here, is clearly not necessary to encourage private enforcment of the antitrust laws as made clear by the heretofore mentioned experience of the City of Philadelphia, and this contention is a mere bootstrap argument in an attempt to bolster the fee petition. The list of cases in which counsel for the Class Representatives participated, presented on pages 19 and 20 of Mr. Berger's affidavit filed in support of his fee petition, alone demonstrates that he is not hesitant to file antitrust suits. And, in the Plumbing Fixtures cases alone, in which a petition for fees for Counsel for the Temporary Class Representatives was filed in Mr. Berger's behalf, the $800,000 plus in fees that Counsel for the Temporary Class Representatives will receive from their retained clients pursuant to private fee arrangements more than adequately rewards them for the time and effort spent on those cases.[1/]

The contention that huge, unreasonable fees are essential to encourage private enforcment of the antitrust laws was laid to rest by Judge Gibbons of the Court of Appeals for the Third Circuit in Hackett, supra, when he said:

> A number of federal statutes provide for the award of counsel fees and costs.

[1/] The Court did award Counsel for the Temporary Class Representatives in the Plumbing Fixtures cases additional fees--$1.375 million from a $26 million settlement fund. Some of the Objectors here are members of the class in the Plumbing Fixtures cases, and feel that that Court seriously erred in granting those fees in Plumbing Fixtures; a Notice of Appeal from that award will be filed as soon as the formal order is entered on the Court's opinion.

> Indeed, the statute under which Mrs. Hackett sues contains such a provision. 15 U.S.C. § 15 (1971).... There is no certain basis for the assumption that an interested holder of a small claim will be unable to prevail upon a private attorney to pursue that claim in the hope of being compensated by the award of 'reasonable counsel fees' against a wrongdoer. Moreover, the burgeoning in recent years of interest in publicly supported legal service organizations and of private support for legal aid and public interest law firms cannot be disregarded. Many small but important claims heretofore, for purposes of litigation, beyond the pale of financial practicability, have been successfully litigated by such organizations in recent years. (Footnotes omitted.)
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> * * *
>
> There is no compelling need to go beyond those inducements to the bar which already encourage a lively pursuit of private enforcement remedies. (Emphasis supplied.)
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> * * *
>
> If the public interest issue involved in the individual suit is so insignificant that neither a private nor a public attorney deems it worthy of pursuit, despite the availability of an award of attorneys' fees in the event of success, then the public interest issue may well be so insignificant that the redress of the . . . wrong should from a policy viewpoint be left to the realm of private ordering .... If in some cases ... the individual claim often will be so small that neither private nor public lawyers think it should be litigated, then that decision of the legal market-place may be the best reflection of a public consciousness that the time of the lawyers and the court should best be spent elsewhere. (At 91,391, 91,393.)

Indeed, the statistical data published by the Administrative Office of the United States Courts, of the large and increasing number of antitrust cases filed in recent years shows that no additional financial incentives are necessary to insure full antitrust enforcement. The Annual Reports of that office shows that 1445 private antitrust suits were filed in the fiscal year ended June 30, 1971, while only 472 were filed in the fiscal year ended June 30, 1965, more than a 200% increase![1]

The Supreme Court's opinion of March 1, 1972, in Hawaii v. Standard Oil Co., 40 L.W. 4246, buttresses the conclusion of the Third Circuit Court of Appeals that fees of the magnitude awarded by courts after judgment, under Section 4, are adequate to insure private enforcement of the antitrust laws. In language similar to that used by Judge Gibbons in Hackett, Mr. Justice Marshall wrote for the Court in Hawaii:

> The fact that a successful antitrust suit for damages recovers not only the costs of litigation, but also attorney's fees, should provide no scarcity of members of the bar to aid prospective plaintiffs in bringing these suits. (At 4250.)

While we recognize that plaintiffs who created the Fund before this Court are entitled to have their expenses, including attorneys' fees, charged against the Fund, the Court cannot award attorneys' fees to the attorneys for plaintiffs. In Fleischmann Corp. v. Maier Brewing, 386 U.S. 714 (1967), Chief Justice Warren, after discussing the fund theory doctrine and other limited exceptions to the rule in American jurisprudence against awarding attorneys' fees, stated that where the Congress has spoken on the remedies in a particular area of the law, the courts cannot enlarge these remedies:

> Although some American commentators have urged adoption of the English practice in this country, our courts have generally resisted any movement in that direction. The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.
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> * * *
>
> Limited exceptions to the American rule have, of course, developed.... The case upon which petitioners here place their principal reliance--Sprague v. Ticonic National Bank, 307 U.S. 161 (1939)--involved yet another exception. That exception had previously been

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[1] 1971 Annual Report, Table C 3, and 1965 Annual Report, Table C 3.

> applied in cases where a *plaintiff* traced or created a common fund for the benefit of others as well as himself. *Central Railroad & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885); *Trustees* v. *Greenough*, 105 U.S. 527 (1882)....
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> * * *
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> *The recognized exceptions to the general rule were not, however, developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies*.... *When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not really be implied*. (Footnotes omitted, emphasis supplied; at 717-720.)

Since the statutory provision of Section 4 of the Clayton Act provides for an award of attorney's fees only to a successful plaintiff, this Court has no statutory authority to award fees to Counsel of the Temporary Class Representatives. Under the fund theory doctrine this Court could relieve the plaintiffs of their expenses of creating the Settlement Fund, if they had so petitioned this Court.

We have shown that the contention of Counsel for the Temporary Class Representatives that huge fees should be paid to him because of the "windfall" nature of private treble damage actions has no basis whatsoever in a settled case. Thus, the dicta found in *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, Civil Action No. 41774SC (E.D. Pa., filed April 28, 1972), "that the treble damage feature of antitrust recoveries means that counsel can be generously paid without actual cost to the claimants in that counsel fees merely produce a windfall" (Slip Opinion, page 25) is irrelevant in a settled case where there is no treble damage judgment. Certainly Counsel will not contend that the claimants are in fact receiving treble their actual damages. As between purchasers who were presumably overcharged and plaintiffs' counsel who had no fee arrangements with class members, we submit that the claimants rights to the

Settlement Fund are paramount to the claim of Counsel for attorneys' fees.

Moreover, the warning of the Court of Appeals for the Eighth Circuit in Twentieth Century-Fox Film Corp., v. Brookside, 194 F.2d 846 (8th Cir.), cert. denied, 343 U.S. 942 (1952), that "... it is the duty of appellate courts to protect against 'vicarious generosity' in the matter of attorneys fees", is even more appropriate when fees are being assessed against class members who are victims of the violations than it is when the fees are assessed against the defendants.

Furthermore, in Paragraph 48 of Mr. Berger's affidavit filed in support of his fee petition he agrees that not only has the class action issue in this case not yet been ruled on by the Court but that it is a hotly contested matter and that it is not at all clear that the Court would have resolved this issue in favor of plaintiffs. Thus, instead of being Counsel for the Class Representatives per se in a class action, petitioner in this litigation serves as Counsel for the Class Representatives only temporarily, for settlement purposes only. Thus, all legal services expended and expenses incurred prior to December 13, 1971, by necessity, were undertaken by Counsel not as Counsel for the Class Representative but as counsel for the named plaintiffs in 3 of the 55 Grinnell cases pending in this Court.

One of the prime motivating factors for using the class action device is that it may be an economic and efficient manner in certain cases to resolve a multitude of similar claims. Mr. Berger, in a recent article entitled "Class Actions" Case & Comment (Jan.-Feb. 1972) at 26, stated one of the reasons for class suits as follows: "Costs of litigation are shared on a fairly allocable basis."

Clearly, however, just as the civil judicial system exists for the benefit of litigants and not attorneys, so does

Rule 23. One of the purposes of Rule 23 is that by a sharing of litigation costs "on a fairly allocable basis," the litigants and the members of the class would benefit. As Counsel for the Temporary Class Representatives in this case would have it, however, the only economy and efficiency promoted would not inure to the benefit of the class members but only to the private financial interest of Counsel for the Temporary Class Representatives. Counsel's approach in this case would allow an attorney to do work for one client or for a relatively few plaintiffs, as is here the case, and then to charge the 14,079[1/] claimants separately for the same identical work by having this Court impress on the class by judicial fiat a contingent fee contract that might well have been reasonable if only applicable to one or a few claimants.

We respectfully submit that this is not the type of economy and efficient administration of justice which Rule 23 was designed to achieve. The fair allocation of costs of litigation could only be achieved if his clients' fee and cost burden to him, incurred pursuant to their contingent contracts, were shared by all members of the class under the fund theory doctrine.

V.

THE FUND THEORY DOCTRINE

This Court sits in equity in ruling on the fee applications in this case. As heretofore shown, the fee provision of Section 4 of the Clayton Act is not applicable here, since plaintiffs did not obtain a judgment. Section 4 cases do, however, prescribe the outer limits of the fee awards which a court of equity can make in a case not successfully litigated but settled.

In Sprague v. Ticonic National Bank, 307 U.S. 166

[1/] Paragraph 22 of Mr. Berger's affidavit states that 14,079 claims have been received.

(1939), the Supreme Court stated the considerations motivating the creation of the equitable fund theory doctrine as follows:

> [T]he foundation for the historic practice of granting reimbursement for the cost of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation.

The chancellor in doing equity in passing on a petition of a litigant for reimbursement of his expenses incurred in creating a fund from which others will benefit has the inherent power to tax those reasonable expenses (including attorneys' fees) to the fund. *The sole purpose of the fund theory doctrine is to reimburse the litigant for the expenses he incurred in the class' behalf*. The rule was stated recently by the late Mr. Justice Harlan in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391-392 (1970), as follows:

> While the general American rule is that attorneys' fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule .... A primary judge-created exception has been to award expenses where a *plaintiff* has successfully maintained a suit, *usually* on behalf of a class, that benefits a group of others in the same manner as himself. See Fleischmann Corp. v. Maier Brewing Co., 386 U.S. at 718-719, 18 L.Ed.2d at 478, 479.... (Footnote omitted; emphasis supplied.)

Thus, under the equitable power of the Court, if the litigants in this case who incurred fee and cost obligations to Counsel for the Temporary Class Representatives in creating this Fund had petitioned to be relieved of their burden, this Court could have charged the Fund with the litigants' reasonable expenses, including attorneys' fees. By so doing, the Court would be allocating the burden of creating this Fund to all claimants. Moreover, this would be in keeping with the principle of Rule 23 in allowing multiple claims similar in nature to be resolved economically, without the incurrence of substantial legal expenses on the part of each class member, large and small alike. However, the application before the Court for an award of a 25 percent contingent fee from *each* class member's recovery, rather than lightening the burden of plaintiffs by apportioning their costs over the entire class, merely multiplies by 14,079 the burden incurred by plaintiffs.[1/]

The fact that the petition of Counsel for the Temporary Class Representatives for attorneys' fees in this case will not lighten one iota the burden of their clients incurred in contributing to the creation of the Settlement Fund in this case, makes clear why the Court of Appeals for the Fifth Circuit, in *Berry* v. *Root*, 148 F.2d 945, *cert. denied*, 326 U.S. 755 (1945), unanimously stated that under the "better rule", the litigant, and not his attorney, should apply for an equitable decree to recover his reasonable expenses incurred in any set of circumstances calling for an application of the fund theory doctrine:

> The amendment of the petition stating the petitioners had settled with their client, Wright, under agreement that they might pursue in their own name their claim for more fees, does not help their case. *The true theory of requiring other parties to a case to help pay the attorney's fee of the party whose activity has benefitted them, is that such a sharing of the burden is the equitable right of the party. It ought to be enforced in the name of the party*, and include all other expenses necessary to the litigation. Except where the law provides for a fee to be paid to the attorney, *according to the better rule the attorney ought not to proceed for the contribution in his own name, but in the name and right of his client*. These attorneys by releasing their client who employed and primarily owes them certainly do not strengthen their claim against others who did not employ them and ordinarily would owe them nothing, though benefitting by

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1/ Also, in *Ace Heating & Plumbing Co.* v. *Crane*, 453 F.2d 30 (3rd Cir. 1971), Chief Judge Seitz, speaking for a unanimous panel, volunteered that an award of fees of 25% gave the Court "...some concern in view of the fact that the case never went to trial" (n.1), even though, we understand, this issue was not briefed or argued in that appeal.

> their services. 5 Am.Jur., Atty. and Client, §§ 154, 155. (Emphasis supplied; at 947.)

Recently, in Kahan v. Rosenstiel, 424 F.2d 161, 165-166 (3rd Cir. 1970), Judge Adam succinctly summed up the fund theory as follows:

> Counsel fees and expenses incurred in litigation are not ordinarly recoverable in the absence of a statute or contract authorizing them. Fleischmann Distilling Corp. v. Maier Brewing Company, 386 U.S. 714, 87 S. Ct. 1404, 18 L.Ed.2d 475 (1967). There is, however, a well established exception in situations where a party has by his own effort and expense created or preserved a fund which benefits others. Mills v. Electric Auto-Lite Company, 396 U.S. 375, 90 S.Ct. Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); Trustees v. Greenough, 105 U.S. 527, 26 L. Ed. 1157 (1881); 6J Moore Federal Practice ¶54.77[2] (2d ed. 1966). In such circumstances, it would be unjust to require one party to bear the entire expense which necessarily results in a benefit to a large class of persons. (Emphasis supplied.)

And, in Thomas v. Honeybrook Mines, Inc., 428 F.2d 981, 985 (3rd Cir.
(3rd Cir. 1970), the Court wrote:

> Trustees v. Greenough, 105 U.S. 527..., is the seminal case, and subsequent developments are reviewed in Judge Adams' opinion in Kahan v. Rosenstiel,... Both that case and Mills v. Electric Auto-Lite Co., 396 U.S. 375 ... (1970), on which it relies, indicate that the equitable rule against saddling the active representative of a class with the entire expenses of legal efforts of benefit to all should not be applied in a narrow technical manner. (Emphasis supplied.) 1/

As Judge Gibbons wrote in Honeybrook Mines, Trustees v. Greenough is the seminal case, and it deserves full discussion.

Trustees v. Greenough reached the Supreme Court on appeal from an award of costs to Vose, a bondholder, whose efforts

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1/ The Court's comment that the rule should not be applied in a narrow technical manner related to whether or not the party or class representative petitioning for expenses, including reasonable attorneys' fees, had to, in effect, establish a direct causal connection between his efforts, and his efforts alone, and the creation or preservation of the fund in question.

consuming his full time for a period of more than eleven years had undeniably benefitted all similar bondholders. As to Vose's contribution, Mr. Justice Bradley commented:

> The litigation was carried on with great vigor and at much expense and, in fact, a large amount of the trust fund was secured and saved.... Vose, the complainant, bore the whole burden of this litigation, and advanced most of the expenses which were necessary for the purpose of rendering it effective and successful. (At 529.)

On the petition by Vose for reimbursement, the lower court appointed a master to take evidence on Vose's contribution to the fund and his expenses, and made an award to Vose. On appeal, the Supreme Court held:

> He [Vose] may be said to have saved the fund for the cestuis que trust, and to have secured its proper application to their use.... [H]e has expended a large amount of money for which no allowance has been made, nor can properly be made.
>
> * * *
>
> It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to re-imbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts. (At. 532-533.)

Although holding that Vose was entitled to be reimbursed for the "cost ... between solicitor and client", Mr. Justice Bradley was careful to warn that a court of equity must be cautious in awarding costs to any party, must avoid approving excessive costs, and noted that the allowance of exorbitant costs to any petitioner can bring the judiciary into disrepute:

> In the vast amount of litigation which has arisen in this country upon railroad mortgages, where various parties have intervened for the protection of their rights, and the fund has been subjected to the control of the court and placed in the hands

> of receivers or trustees, it has been the common practice, as well in the courts of the United States as in those of the States, to make fair and just allowances for expenses and counsel fees to the trustees, or other parties, promoting the litigation and securing the due application of the property to the trusts and charges to which it was subject. Sometimes, no doubt, these allowances have been excessive and perhaps illegal; and we would be very far from expressing our approval of such large allowances to trustees, receivers and counsel as have sometimes been made, and which have justly excited severe criticism.
>
> Still, a just respect for the eminent judges under whose direction many of these cases have been administered, would lead to the conclusion that allowances of this kind, if made with moderation, and a jealous regard to the rights of those who are interested in the fund, are not only admissible, but agreeable to the principles of equity and justice. (Emphasis supplied; at 536.)

Central Railroad & Banking Co. v. Pettus, 113 U.S. 116 (1885), cited for the proposition that it is proper for the attorney instead of the litigant to seek a fee from a Fund, is a complicated but distinguishable case. Branch, Sons & Co., bondholders, engaged counsel to commence a suit in equity which was successful, and from which many creditors benefitted. Branch, Sons & Co. sued in their own behalf, "... as well as for all other creditors ... who should come in and make themselves complainants and contribute to the expenses of the suit." (At 119.) The court stated the facts surrounding the engagement of counsel as follows:

> [I]t is proven that when ... [counsel] engaged their professional services to Branch, Sons & Co., ... it was understood by the latter that their solicitors entered upon the preparation of the suit, in the belief that they had the right to demand and would demand such additional compensation as was reasonable, in respect of unsecured creditors who accepted the fruits of their labors by filing claims; ... Mr. Watts, in his deposition, says that on the occasion of his contract for a fee with Branch, he 'Stated to him that the bill which we should file, although it should be in the name of his firm, would be for the benefit of all the creditors ...'

> and that we should charge him so small a fee, with the expectation that we should be paid a large fee out of the fund brought into court or condemned by our labors....' (Emphasis supplied; at 125-126.)

The creditors' litigation in Central R.R. is quite different from this case. Counsel for the Temporary Class Representatives could not have entered into a fee arrangement with their retained clients on the understanding that they would receive a fee from the Settlement Fund, because it could not have been assumed that this Court would find that these suits could be properly maintained as class actions. Thus, instead of contracting for a "small fee," such as 5% as was contracted for in Central R.R., Counsel for the Class Representatives contracted for 25% and 33 1/3% of their clients' recovery to make certain that their labors would be adequately rewarded by their retained clients. And as previously discussed, that fee contract will adequately reward him for his labors.

Central R.R. does not hold that counsel in any case can be awarded an unreasonable, or "windfall" fee not directly related to the value of his services. In reaffirming Trustees v. Greenough in Central R.R., the Supreme Court stated:

> It is clear that, within the principles announced in Trustees v. Greenough, Branch Sons & Co. and their co-complainants are entitled to be allowed, out of the property thus brought under the control of the court, for all expenses properly incurred in the preparation and conduct of the suit, including such reasonable attorneys' fees as were fairly earned in effecting the result indicated by the final decree. (At 124.)

The lower court in Central R.R. had awarded counsel fees of 10% of the fund, but the Supreme Court reduced this award to 5%, thus indicating its view of "reasonable." In addition, the Supreme Court noted that the clients of the attorneys had made a secret compromise of the claims at issue, "... agreed to withhold from their solicitors the fact of such settlement until the Georgia Corporations could buy or settle all other claims of the unsecured creditors ...." (At 120.) All that *Central Railroad* holds, is that in a proper case, equity will be done. This is all that the Objectors ask from this Court. However, the fee sought by Counsel for the Temporary Class Representatives is so excessive as to be unconscionable, and assessing such fees against the claimants' partial recoupment of their overcharges would be inequitable.

In *City of Wewoka, Okl.* v. *Banker*, 117 F.2d 839 (10th Cir. 1941), in commenting on the principles laid down in *Trustees* v. *Greenough*, *Sprague*, and other fund theory cases, Judge Murrah carefully noted:

> The power of the court is capable of abuse and should be exercised with caution and regard to the rights of litigants. (At 841.)

It would be a distortion of the fund theory doctrine and an abuse of discretion to ignore the rights of the class members in this case by impressing on the class a contingent fee contract out of proportion to the fair value of the legal services rendered to the class. Moreover, this would not achieve the purpose of the fund theory doctrine, because it would not relieve the burden of the litigants in this case for whose sole benefit the doctrine was judicially created. Hence, the fund theory doctrine does not authorize this Court to adopt the approach urged by Counsel for the Temporary Class Representatives, and the doctrine does not lend support to his fee petition.

VI.

AN HOURLY BASIS IS THE PRIMARY FACTOR IN ANY EQUITABLE METHOD OF FIXING A FEE IN THIS CASE: THE FEES SOUGHT ARE EXCESSIVE

As pointed out in the revised draft of the *Multidistrict Manual* quoted above, in fixing fees in this case, this Court should place the "emphasis on the time and labor required and the effect of the allowance on the public interest and the reputation of the courts." The draft goes on to state that "in no event" should a class determined by judicial fiat be impressed with a contingent fee contract that may have been entered into voluntarily by the Temporary Class Representatives and their counsel. Moreover, in Trans World Airlines, supra, this Court stated:

> A percentage fee gives undue weight to the size of the recovery .... [W]here the recovery is extraordinarily high, it could result in an excessive award. (At 484.)

Contingent fee arrangements are only proper where an attorney assumes a significant risk in taking on a lawsuit. Although Counsel may have assumed some minor risk in the named plaintiffs' behalf, this risk was minimal because the Supreme Court had already determined defendants' liability. And, he incurred no risk on behalf of the class because he became Counsel for the Temporary Class Representatives after the case had already been settled. Also, of course, when an attorney enters into a contingent fee contract, there are always risks inherent in the trial of a lawsuit, and trial is always time consuming. However, when he became Counsel for the Temporary Class Representatives, the cases having already been settled, there was no prospect of a trial.

We respectfully submit that if Counsel for the Temporary Class Representatives is eligible for a fee in this case, the only equitable way to determine the amount of the fee is for the Court to hold an evidentiary hearing on the value to the Fund of the legal services performed. Hence, in reaching decision on Counsel for the Temporary Class Representative's fee request, the Court must determine what a knowledgeable client could reasonably be expected to pay Counsel for perfecting a settlement in which there was no risk involved. A fair hourly rate must be the primary factor for measuring a fair fee, modified either up or down by the risks incurred, the result achieved and the difficulties encountered.

In Plumbing Fixtures, supra, involving a fee petition by the same counsel, the Court found that a fee of $500 an hour "would be excessive." (Slip Opinion at 24-25). Although the Settlement Fund in that case was more than twice as large ($26 million) as the Fund here, the Court's fee award was about half ($1.375 million) the fees sought here. Rather than 25% of the fund, as sought here, the Court's award there constituted about 5% of the Fund in Plumbing Fixtures.[1/]

In determining the amount of fees in Trans World Airlines, supra, this Court noted that "One of the factors to be considered in determining a reasonable fee is whether the plaintiff had the benefit of a prior government judgment or decree." (At 482.) Counsel did not there, but he did here. Also, this Court quoted at length the individual factors listed by the Court in Hanover Shoe as relevant to the fee issues (at 480) and then subsequently concluded:

> It seems to me that the major factors bearing on the fixing of attorneys fees in antitrust cases are the complexity of the problems presented, the skill of counsel, and the measure of success achieved by counsel. (At 484.)

This record is devoid of any basis for attributing success to Counsel for the Temporary Class Representatives, and the liability issue cannot be said to be at all complex after the Supreme Court's decision in the Grinnell case. Mr. Berger's affidavit submitted in support of his fee petition itself establishes that for all practical purposes these cases were "self-settling." He states in Paragraph 18:

> [C]ommencing on June 30, 1971, Petitioner travelled to New York on four separate occasions

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[1/] As heretofore stated, the fees in Plumbing Fixtures are still considered excessive, and a Notice of Appeal will be filed.

> to attend four lengthy settlement meetings. It was these meetings, interspersed with telephone calls and correspondence, which resulted in the settlement now before this Court. (Emphasis supplied.)

Attendance at "four lengthy settlement meetings"--even if they had lasted for ten hours each--certainly does not justify a fee of the magnitude sought here.

We suggest that even if all of the attorneys' time purportedly expended by Counsel for the Temporary Class Representatives in this litigation were fairly recorded and did benefit the class, and using the liberal figure of $50 an hour for junior attorneys' time, all this Court could charge against the Settlement Fund for the 542 hours of junior attorneys' time claimed by Counsel for the Class Representatives would be $27,100. And using the liberal figure of $100 an hour for senior attorneys' time, all this Court could charge against the Fund for the 1,814 hours of senior attorneys' time claimed by Counsel for the Class Representatives would be $181,400. This results in a very reasonable total of $208,500.

Moreover, in Trans World Airlines, supra, this Court stated:

> I would estimate that a 'mix' rate of $75 an hour would be charged by outstanding, experienced law firms in this city. (At 484.)

Applying that rate to the 2,356 hours of attorneys' time purportedly expended in the class' behalf would result in a fee of $176,700. We submit that no greater fee award can be justified here.

Even so, however, under [illegible] theory doctrine heretofore discussed, if [illegible] this case had petitioned to have their reasonable expenses incurred in creating the Fund charged to the Fund, under an application of the fund theory doctrine, they would have to demonstrate that they had substantially benefitted the class.

However, we believe that an evidentiary hearing will show that Counsel for the Temporary Class Representatives contributed little, if anything, to the creation of the Settlement Fund. This is made clear by the March 9, 1972, letter of the "Troika" attorneys attached hereto as Exhibit C in which they state that it was their work which materially benefitted the class.

Although the position of the Troika that they, and not Counsel for the Temporary Class Representatives, materially advanced the interests of the class here may be well founded, they clearly cannot seek fees from a settlement in a case in which they do not represent any party.

VII.

COUNSEL FOR THE CLASS REPRESENTATIVES HAVE A DISABLING CONFLICT OF INTEREST.

In addition to the unreasonableness of the amount of fees sought by Counsel for the Temporary Class Representatives, there are other equitable grounds which preclude this Court from granting the application of Counsel for the Class Representatives: He has a disabling conflict of interest which bars this court of equity from granting his fee petition.

Counsel for the Temporary Class Representatives dominated the Committee which determined whether or not any claim was to be allowed or was to be challenged. For all practical purposes, Counsel for the Temporary Class Representatives was the "Committee". Yet, as Counsel for the Temporary Class Representatives, he had an obligation to claimants with "valid claims" to make certain that procedures were established and administered which would assure that doubtful or invalid claims would not go unchallenged, and thereby, dilute the value of valid claims.

Clearly, counsel had a serious problem deciding whether to object to the claims of any of his retained clients because counsel has a contract with them for a fee equal to a percentage of their recovery. Hence, Counsel's own private financial interests would be adversely affected by the disallowance of claims of any of his retained clients; yet representing the class, he had a duty to object to invalid--or even doubtful--claims.

The possibility that Counsel for the Temporary Class Representatives would have conflicting interests was made likely both by the selection of the Committee members and by the approach which the Committee took in processing the claims.--The official claim form required only a sworn statement identifying the contract of purchase and the amount thereof. No supporting data, such as the contracts or any other evidence which would be required in proving a damage claim in any court of law, was required to prove a claim in this case. We suggest that this Court could have delegated these matters to a Special Master, or appointed independent certified public accountants to process these claims; but this responsibility should not have been delegated to a Committee dominated by Counsel for the Temporary Class Representatives because of his inherent conflict of interest.

The fact that this Court may not have heretofore inquired into the disabling conflict of interest or the evidentiary inadequacy of the procedures employed by counsel is not now relevant. Counsel sought the position he assumed.

In any event, the diverse and conflicting roles adopted by Counsel for the Temporary Class Representatives present serious problems concerning the administration of the Fund. Canon 5 of the American Bar Association's Code of Professional Responsibility states that "a lawyer should exercise independent professional judgment on behalf of a client." Ethical Consideration 520, amplifying the basic prohibition against conflict of interest, instructs that a lawyer serving as an impartial arbitrator should not represent any of the parties involved in the dispute. Yet counsel in whom administration of the Settlement Fund was vested was also committed by agreements with retained clients claiming against the Fund. For the same lawyer to have the responsibility for screening claims of non-client class members puts an intolerable strain on the maxim that no attorney can represent adverse interests.

We do not say that invalid claims were in fact allowed, for we do not know that this is so. However, whether or not invalid or doubtful claims went unchallenged, because Counsel was obligated to protect the interest of purchasers with valid claims, the conflict of interest is apparent. The magnitude of the conflict requires that this court of equity deny the application of Counsel for the Class Representatives for an award of fees out of the Settlement Fund.

We are not questioning the integrity of Counsel for the Temporary Class Representatives. Our point is one of law, for "the fact that the motive and intention of the attorney are honest is immaterial." 7 Am.Jur.2d Attorney and Client, §154; Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954).

Moreover, the claim forms themselves, which constitute pleadings, are not on file in the Clerk's office, but rather repose, we believe, in the private law offices of Counsel for the Class Representatives, or in other private offices under his control. In addition, Paragraph 11(b) of Settlement Order No. 1 provides that the affidavit identifying the claimants which the Class Action Committee filed on April 21, 1972, was to be filed *in camera*. Of course, while there may have been some valid reason to protect the list of subscribers to whom notice was sent (that is, the protection of the defendant's customer lists), there is no justification for having claimants file their pleadings (claim forms) establishing their claims *in camera*. We know of no rule of law which authorizes this Court to order that pleadings filed seeking damages be afforded *in camera* treatment.

On the one hand, this *in camera* treatment effectively prevents class members--both those with large and small claims--from organizing or joining together in opposition to the attorneys' fees sought from the Settlement Fund, while on the other, the Legal Notice contained the following provision:

> 4. If you do not elect to be excluded from the classes of plaintiffs, you may, but need not, enter an appearance through counsel of your choice if you desire, and you have all the rights set forth in Rule 23 of the Federal Rules of Civil Procedure. *If you do not request exclusion or enter an appearance you will be represented by David Berger, Esq.* (Emphasis supplied.)

We respectfully submit to the Court that its approval of the Legal Notice in this form sanctions overreaching by plaintiff's counsel, and this Court's approval of solicitation of clients. Rule 23 contemplates that the *class representative* will adequately protect and press the interests of class members, and, of course, envisions that the class representative will be represented by counsel. It does not contemplate, however, that counsel for the class representative will in fact represent every class member. The comments of Judge Wyzanski in *Cherner v. Transitron Electronic Corporation*, 201 F. Supp. 934, 936 (D. Mass. 1962), in commenting on a class action situation under the old Rule 23 are relevant here.

> Despite plaintiffs' contentions to the contrary, this Court does not regard them or their counsel as having any fiduciary duty to notify potential members of the spurious class of this litigation and of their opportunity here to intervene. 'These plaintiffs are not their brothers' keepers.' Hormel v. United States, So.D.N.Y., 17 F.R.D. 303, 305.

> Ordinarily the primary duty of counsel is to his own client.... No precedent supports the suggestion that the plaintiffs or their counsel have a moral duty to act as unsolicited champions of others. Without going so far as to agree with defendants' arguments that the proposed conduct of the plaintiffs or their counsel would be champertous, or would violate either Canon 27 or Canon 28 of the American Bar Association Canons of Professional Ethics, this Court concludes that at the present stage of the controversy (when there is no more reason to accept as true plaintiffs' declaration that defendants' answers,) Rule 23 should not be used 'as a device to enable client solicitation.' Bain and Blank, Inc. v. Warren Connelly Company, So.D.N.Y., 19 F.R.D. 108, 111.

Finally, we point out that the Notice to members of the class required them to make the decision whether or not to opt out before the claimants knew the magnitude of the claims to be filed or how the total Settlement Fund would be divided between the three sub-classes. Here again, counsel's obligations to some of those he now claims to represent were in conflict with those of others he also seeks to represent.

VIII.

CONCLUSION

For the foregoing reasons, we respectfully submit that all applications for attorneys' fees and costs, other than the costs incurred in administering the Fund to be determined after an evidentiary hearing, should be denied.

Respectfully submitted,

WILLIAM SIMON
G. JOSEPH KING
HOWREY, SIMON, BAKER & MURCHISON
1707 H Street, N. W.
Washington, D. C. 20006
(202) 298-6450

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FINAL CITY EDITI

Berger May Get $2.5 Million in Winning Suit for City

By DON McDONOUGH
and JEREMY HEYMSFELD
Of The Inquirer Staff

David Berger, attorney, stands to gain $2.5 million in legal fees from an out-of-court settlement of a city anti-trust suit, as the result of an agreement with the Tate administration.

Berger, a former city solicitor and unsuccessful Democratic candidate for district attorney in 1969, will get the 25 percent fee if a U. S. district judge in New York approves the $10 million settlement later this month.

His agreement with the city was denounced as "outrageous" by City Controller Tom Gola.

"This is nothing more than a bonanza for David Berger," the Republican controller said. "We have a whole city solicitor's staff to do this kind of work."

Berger termed Gola's charges "hogwash" and said the 25 percent was "in line with standard procedures approved by a number of Federal judges."

The cities of Philadelphia and Detroit and eight private plaintiffs brought the price-fixing suit jointly.

The four defendants in the action are: Grinnell Corp., American District Telegraph Co., Holmes Electric Protective Co. and Automatic Fire Alarm Co.

"He (Gola) in nothing but a publicity seeker looking for headlines," Berger declared. "Gola should be complimenting me on getting a substantial settlement for Philadelphia."

Berger's suit charged that the four defendants, all in the "protective systems service business," had overcharged their customers over an 11-year period.

He called the $10 million an "equitable recovery" of overcharges by the four companies, which he said monopolized the burglar-alarm industry.

"I personally initiated this action (in 1968)," Berger continued. "I am going to be paid out of a fund (the $10 million) I created; there would be no fee nor any benefits to the city if I didn't take this action."

Berger said he did not know how much of the $10 million would go to Philadelphia, "but the city would benefit greatly — they didn't spend a penny on this."

The arrangement agreed upon calls for the plaintiffs to share the $7.5 million remaining after Berger's fee is deducted.

"I have been in and out of court repeatedly on this matter and I've analyzed more than 100,000 documents in pre-trial proceedings," Berger said.

The former city solicitor is working under an agreement signed by Levy Anderson, city solicitor under Mayor James H. J. Tate, and now a Common Pleas Court judge. Under the agreement, Berger would have received no fee or expense payment, if he lost the case.

"*I personally initiated this action . . . There would be no fee nor any benefits to the city if I didn't take this action.*"
—David Berger

"*This is nothing more than a bonanza for David Berger. We have a whole city solicitor's staff to do this kind of work.*"
—Tom Gola

The Philadelphia Inquirer ◆ Thursday, Feb. 3, 1972 21

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TV and Radio

City Seeks to Cancel Berger's Contracts On Antitrust Work

Payments Of $188,000 Are Cited

By DON McDONOUGH
and JEREMY HEYMSFELD
Of The Inquirer Staff

Declaring that David Berger has earned $188,000 in legal fees from Philadelphia over the past two years, City Solicitor Martin Weinberg said on Wednesday that he would seek to cancel all city contracts with the attorney.

At the same time Weinberg announced he would set up a special unit within his office to handle the sort of antitrust work which Berger has been doing under contract.

HUNTS FOR DEPUTY

"We will start with a one-man division and I will begin looking for a deputy to head it," Weinberg added. Deputies earn about $24,000-a-year.

Weinberg said the new division was being established at the urging of Mayor Frank Rizzo. "The mayor and I both feel that these fees could be coming into the city treasury and it would be a real service to the city.

"This office should have control of antitrust suits, its good management," the solicitor said.

HOLDS 4 CONTRACTS

Berger is a former city solicitor and unsuccessful Democratic candidate for District Attorney. Over the past few days, The Inquirer has disclosed that Berger has at least four current contracts with the city which were signed during the Tate administration.

The pacts call for Berger to receive 25 percent of any settlements received in price-fixing suits.

One of the four contracts would give him $2.5 million from the settlement of an action against four burglar alarm companies. Philadelphia is one of several thousand claimants in this case, thus the city's share of the fee is substantially less than $2.5 million.

Weinberg gave the following breakdown of the Berger fees (25 percent of what the city got):

—$13,400 from the 1970 settlement of two cases involving brass pipe firms; the city got $43,800.

—$2,808 from the 1970 settlement of a price-fixing suit against library book distributors; the city got $8,425.

—$5,691 from the settlement of a 1970 case against baking supply firms; the city got $17,073.

—$1,061 from the 1971 settlements of two cases involving brass tubing; the city got $3,200.

—$51,098 from the 1971 settlement of a concrete pipe case; the city got $153,298.

—$883 from the settlement in 1971 of another brass tubing case in which the city received $2,677.

—$113,858 from the 1971 settlement with a number of pharmaceutical firms; the city got $331,994.

EXHIBIT B

PARKER, CHAPIN AND FLATTAU
530 FIFTH AVENUE
NEW YORK, N. Y. 10036

ALBERT PARKER
SAMUEL H. CHAPIN
HENRY L. FLATTAU
STUART D. GLOVER
MONROE CHAPIN
EMANUEL KLINPL
IRVING P. ROBERSON
IRVING ROSENZWEIG
ALVIN M. STEIN
HERMAN GORDON

JAMES M. JACOBSON
JOHN E. JAY
HERBERT L. ROSEDALE
SEYMOUR LEVINE
MARVIN M. FULLER
SIMON JACOBSON
RONALD H. LEVIN
ALAN J. FISCHL
MARK ABRAMOWITZ

LEO PILLAR
AMOS ALTER
NORMAN C. BENSLEY
HARVEY M. BONEPARTH
BARRY J. BRETT
STEPHEN R. DELMAN
LEON S. FIELD
LAWRENCE B. FISHER
JOHN W. FLATTAU
KENNETH H. GOLD
RICHARD E. GUTMAN
STEPHEN F. HARMON
MYRON L. KAPLAN
FREDRIC A. KLEINBERG

DAVID A. LEFF
MICHAEL A. LEICHTLING
EDWARD J. LEVITZ
THEODORE J. MALVIN
JORDAN M. NEWMAN
PETER M. PANKEN
ROBERT M. PLAHL
BERNARD PERSKY
MICHAEL J. SHEF
DONIEL SHERMAN
G. MICHAEL THROPE
STEVEN J. WOHL
JOEL M. WOLOSKY
MARTIN ZELNER

TELEPHONE
986-7700
AREA CODE 212

CABLE ADDRESS
LAWPARK

March 9, 1972

TO ALL COUNSEL FOR SUBSCRIBER-PLAINTIFFS
IN THE CENTRAL STATION PROTECTION CASES

Gentlemen:

As you know, an application for a fee in the amount of 25% of the fund made available in the class action has been made by the attorneys of record for the plaintiffs in the class action--the firm of David Berger, P.A. The total amount of the fee sought is $2,500,000 based upon the agreed settlement of $10,000,000.

Since the middle of 1969, a "Troika", consisting of Liebman, Eulau, Robinson & Perlman, Parker, Chapin and Flattau and Weil, Gotshal & Manges, has been acting by direction of the Court on behalf of all subscribers. Our efforts and those of other counsel for subscriber-plaintiffs have included acting on behalf of the class action plaintiffs. Our activities consisted of extensive substantive work and considerable administrative activity with regard to the pending litigation. It is our view that the class actions were materially advanced by these activities.

In this light, the three firms constituting the "Troika" have decided it would be appropriate to seek an allowance from the Court of part of the sum awarded as counsel fee in the class action. As part of that application, it is our intention to indicate that we believe the fee requested--25% of the settlement--exceeds the amount necessary to adequately compensate the attorneys who have generated the class fund. In that connection, we presently propose to seek an allowance of approximately 25% of the amount which the Court determines to be an appropriate counsel fee. We anticipate that we will communicate with David Berger's firm in this regard within the next week to advise them of our intention and review a proposed course of action with them prior to the making of any applications to the Court. Before so doing, we deemed it appropriate to advise all subscriber-plaintiffs' attorneys and invite any suggestions or comments you may have in this regard.

Very truly yours,

LIEBMAN, EULAU, ROBINSON & PERLMAN

PARKER, CHAPIN AND FLATTAU

✓ WEIL, GOTSHAL & MANGES

EXHIBIT C

AFFIDAVIT OF SERVICE BY MAIL

I hereby certify that this 12th day of May, 1972 I served the Objections of Bay Fair Shopping Center, Friendswood Development Company, Garden State Plaza Corp., Humble Oil & Refining Company, International Lubricant Corporation and Shell Oil Company to all Applications for Counsel Fees and Costs, and a Notice of Intention to Appear, pursuant to numbered paragraph 6 of this Court's Legal Notice on David Berger, 1622 Locust Street, Philadelphia, Pennsylvania 19103 and Allen S. Joslyn, Cahill, Gordon, Sonnett, Reindel & Ohl, 80 Pine Street, New York, New York 10005, by depositing the same, with postage thereon fully prepaid, in the United States mail in Washington, D. C.

G. Joseph King
G. Joseph King

Howrey, Simon, Baker & Murchison
1707 H Street, N. W.
Washington, D. C. 20006

Subscribed and sworn to
before me this 12th day
of May, 1972

Virginia A. Martin
Notary Public, District
of Columbia

My Commission expires:

My Commission Expires June 14, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al. :
v. :
GRINNELL CORPORATION, et al. :

68 CIV. 4026
(E.D. Pa. Civ. 68-1478)

MANHATTAN-WARD, INC., et al. :
v. :
GRINNELL CORPORATION, et al. :

68 CIV. 4028
(E.D. Pa. Civ. 68-1489)

1225 VINE STREET BUILDING, INC., et al. :
v. :
GRINNELL CORPORATION, et al. :

68 CIV. 4027
(E.D. Pa. Civ. 68-1479)

REPLY AFFIDAVIT
TO
APPLICATION OF WALD, HARKRADER & ROSS FOR APPORTIONMENT OF COUNSEL FEES

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

HERBERT ROBINSON, being duly sworn, deposes and says:

1. Supplementing my affidavit of May 8, 1972, submitted together with the affidavits of A. Paul Victor, M. Wade Kimsey, and Alvin M. Stein, in support of the Troika's application to limit counsel fees and award at least 25% of whatever counsel fees are awarded to the Troika, I regretfully submit this short affidavit in reply to the affidavit of Joel E. Hoffman, Esq. dated May , 1972.

2. His affidavit generally admits the meaningful contribution made by the Troika to the creation of the settlement

fund herein, as is further evidenced by the affidavit of Nathaniel Whitehorn, dated May 12, 1972, in which it is stated that "it would be most inequitable if a reasonable portion thereof" (i.e., of counsel fees awarded) "were not awarded to the Troika" (page 7), and the conclusion that "the application of the Troika for a portion of the fees awarded is meritorious" (page 8).

3. The firm of Wald, Harkrader & Ross (of which Joel E. Hoffman, Esq. is a member) represented a competitor plaintiff (Hoffman Affidavit, ¶2) and, on information and belief, said plaintiff's action was settled (id. ¶13) and, presumably, compensation was received for the services rendered.

4. I am not deprecating the efforts of Mr. Hoffman and his firm, but it is misleading to give the impression that what was done with respect to the statute of limitations was anything but a tremendous team effort coordinated basically by the Troika. In fact, in my own office alone there is a large amount of independent and original legal research, drafts, coordination of drafts, citations, Shepardizations, questions, comments and other documents pertaining to the statute of limitations problem. I know that the same is true of the other members of the Troika. In addition, the only affidavit submitted in behalf of the plaintiffs in opposition to the motion of the defendants for partial summary judgment based on the statute of limitations was my affidavit sworn to August 1, 1969, and prepar by me, with subsequent modifications by the Troika. Attached to it were Exhibits A through E, and that affidavit represented the result of a very substantial amount of time in preparation.

Indeed, it constituted the bulk of the record on appeal to the United States Circuit Court of Appeals.

5. In essence, the "Troika"'s most meaningful contributions were not only in the statute of limitations proceedings (as to which the Wald, Harkrader & Ross application admits it "did not directly participate in the preparation of the brief in opposition to defendants' certiorari petition" before the Supreme Court as it had already settled its cases [Hoffman Affidavit, ¶13]), but also in other activities and efforts, as more specifically detailed in the affidavits of A. Paul Victor, Herbert Robinson, M. Wade Kimsey, Alvin M. Stein, and Nathaniel Whitehorn.

WHEREFORE, it is respectfully submitted that the Troika be allocated at least 25% of whatever amount is awarded as counsel fees.

Herbert Robinson

Sworn to before me this
17th day of May, 1972.

Lillian Yampole

LILLIAN YAMPOLE
NOTARY PUBLIC, State of New York
No. 41-9762950
Qualified in Queens County
Cert. filed with New York County Clerk
Term Expires March 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

CITY OF DETROIT, et al. : 68 CIV. 4026
(E.D. Pa. Civ. 68-1478)

v.

GRINNELL CORPORATION, et al. :

MANHATTAN-WARD, INC., et al. : 68 CIV. 4028
(E.D. Pa. Civ. 68-1489)

v.

GRINNELL CORPORATION, et al. :

1225 VINE STREET BUILDING, INC., et al. : 68 CIV. 4027
(E.D. Pa. Civ. 68-1479)

v.

GRINNELL CORPORATION, et al. :

AFFIDAVIT OF SERVICE BY MAIL

-----------------------------------x

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

LILLIAN YAMPOLE, being duly sworn, deposes and says that she is
not a party to this action, is over 18 years of age and resides at 34-20
78th Street, Jackson Heights, N.Y. 11372.

On May 18, 1972, she served the within Affidavit upon the follow-
ing named attorneys and the Clerk of this Court at the respective ad-
dresses designated by them for that purpose, by depositing a true copy of
the same enclosed in a postpaid properly addressed wrapper, in a post
office depository under the exclusive care and custody of the United State
Post Office within the State of New York:

David Berger, P.A., 1622 Locust Street, Philadelphia, Pa. 19103.
Wald, Harkrader & Ross, Esqs., 1320 Nineteenth Street NW, WashingtonDC20036
Olwine, Connelly, Chase, O'Donnell & Weyher, Esqs., 299 Park Avenue,
New York, N.Y. 10017.
Kelley, Drye, Warren, Clark, Carr & Ellis, Esqs., 350 Park Avenue,
New York, N.Y. 10022.
Cahill Gordon, Sonnett, Rendel & Ohl, Esqs., 80 Pine Street, New York,
N.Y. 10005.
White & Case, Esqs., 14 Wall Street, New York, N.Y. 10005.
John Livingston, Esqs., Clerk, United States District Court, Southern
District of New York, P.O.Box 1000, Wall Street Station,
New York, N.Y. 10005.

Lillian Yampole

Sworn to before me this
18th day of May, 1972.

Jane Foley

JANE FOLEY
Notary Public, State of New York
No. 31-1234525
Qualified in New York County
Commission Expires March 30, 1973

38-A

Pending/ck

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al : 66 Civ. 4026
v. :
GRINNELL CORPORATION, et al : (E.D. Pa. Civ. 68-1478)

MANHATTAN-WARD, INC., et al : 68 Civ. 4028
v. :
GRINNELL CORPORATION, et al : (E.D. Pa. Civ. 68-1489)

1225 VINE STREET BUILDING, INC. : 68 Civ. 4027
v. :
GRINNELL CORPORATION : (E.D. Pa., Civ. 68-1479)

AFFIDAVIT

STATE OF NEW YORK :
ss:
COUNTY OF NEW YORK :

DAVID I. SHAPIRO, being duly sworn, deposes and says:

1. I am a member of the firm of Dickstein, Shapiro & Galligan, attorneys for plaintiffs in Damon Alarm Corporation, et al v. American District Telegraph Corporation, et al. 68 Civ. Civ. 2789 (SDNY 1968).

2. In Damon Alarm, we settled the claims of 36 competitor plaintiffs (25 of whom were or had been engaged in central station operations on or prior to November 31, 1968) for the sum of approximately $6.6 million. This settlement was finally consummated in January 1971.

3. Despite the fact that many of the competitor plaintiffs we represented were small companies and 11 of them had never engaged in central station operations, we were able to achieve a settlement satisfactory to all our clients because our analysis of what defendants were doing in the market convinced us and defendants' counsel that in the so-called "non-competitive" cities, i.e., cities where one or more of the defendants had no competition from plaintiffs or other central station operators, defendants were charging subscribers a "normal" but "competitive" rate, whereas in "competitive" cities defendants were charging cut-throat competitive rates in an attempt to force plaintiffs out of business. Our own analysis of the facts is borne out in large measure by the evidence adduced in the course of the federal government's case against the defendants.

4. Based on the foregoing, it was and still is my view that the only plaintiffs who actually suffered damages from defendants' antitrust violations were defendants' competitors and that, in the so-called "competitive" cities, subscribers enjoyed lower prices as a by-product of defendants' attempts to force their competitors out of business.

/s/ DAVID I. SHAPIRO
David I. Shapiro

Sworn to and Subscribed
Before me this 20th day
of May, 1972.

[illegible] CALLAGAN

[illegible] 30, 1973
[illegible]
[illegible] County

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -x

CITY OF DETROIT, et al.	:	68 Civ. 4026 (E.D. PA. Civ. 68-1478)
v.	:	
GRINNELL CORPORATION, et al.	:	

- - - - - - - - - - - - - - - - - - -x

MANHATTAN-WARD, et al.	:	68 Civ. 4028 (E.D. PA. Civ. 68-1489)
v.	:	
GRINNELL CORPORATION, et al.	:	

- - - - - - - - - - - - - - - - - - -x

1225 VINE STREET BUILDING, INC., et al.	:	68 Civ. 4027 (E.D. PA. Civ. 68-1479)
v.	:	
GRINNELL CORPORATION, et al.	:	

- - - - - - - - - - - - - - - - - - -x

SIR:

Please enter our appearance as attorneys for counsel David Berger, Esquire and David Berger, P.A., Attorneys at Law, counsel for the class representatives in each of the three above-captioned class actions.

Dated: New York, N.Y.
May 23, 1972

LORD, DAY & LORD

By Herbert Brownell
Herbert Brownell
A Member of the Firm

By Gordon B. Spivack
Gordon B. Spivack
A Member of the Firm

P.O. Address
25 Broadway
New York, New York 10004

TO:
Ross L. Malone, Esq.
767 Fifth Avenue
New York, New York 10022

[illegible] 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al. v. GRINNELL CORPORATION, et al.	66 CIV. 4026 (E.D. Pa. Civ. 68-1478)
MANHATTAN-WARD, INC., et al. v. GRINNELL CORPORATION, et al.	68 CIV. 4028 (E.D. Pa. Civ. 68-1489)
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PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF HIS REQUEST FOR ATTORNEYS' FEES AND CONTRA OBJECTIONS THERETO

DAVID BERGER
H. LADDIE MONTAGUE, JR.
DAVID BERGER, P.A.
1622 Locust Street
Philadelphia, PA 19103

Counsel for Plaintiffs -
Class Representatives

Of Counsel:

Lord, Day & Lord
Herbert Brownell
Gordon B. Spivack
25 Broadway
New York, New York 10004

Harold E. Kohn, P.A., Attorneys-at-Law
Harold E. Kohn
1700 Market Street
Philadelphia, Pennsylvania

UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

CITY OF DETROIT, et al. v. GRINNELL CORPORATION, et al.	66 CIV. 4026 (E.D. Pa. Civ. 68-1478)
MANHATTAN-WARD, INC., et al. v. GRINNELL CORPORATION, et al.	68 CIV. 4028 (E.D. Pa. Civ. 68-1489)
1225 VINE STREET BUILDING, INC., et al. v. GRINNELL CORPORATION, et al.	68 CIV. 4027 (E.D. Pa. Civ. 68-1479)

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF HIS REQUEST FOR ATTORNEYS' FEES AND CONTRA OBJECTIONS THERETO

David Berger, Esquire, and David Berger, P.A. ("Petitioner") file this reply memorandum in support of their original petition for an award of attorney's fees and contra objections thereto.

Including those claimants who are objecting to the settlement, a total of approximately 160 claimants (representing 1.1% of all claimants) have filed objections to Petitioner's request for an award of counsel fees. It is significant that the most vociferous objectors are:

(a) Attorneys (representing approximately 60 claimants) who themselves are seeking substantial fees by asserting claims to a share in the award of Petitioner's fees; and

(b) Antitrust defendants who have filed claims in these cases and have adopted these actions as a forum in which to attack antitrust enforcers and particularly the class action under Rule 23, F.R.C.P. This category includes the following Claimants: General Motors Corporation, Ford Motor Company, Humble Oil Company, Shell Oil Company, and American Cyanamid Company.

With respect to the remaining objectors, Petitioner relies on the initial papers in support of his request for fees. As to the objectors in categories (a) and (b), this reply is respectfully submitted.

I.

RESPONSE OF COUNSEL FOR CLASS REPRESENTATIVES TO APPLICATION BY "TROIKA" FOR A SHARE OF COUNSEL FEES

BACKGROUND

Counsel for class representatives (hereinafter "Petitioner") filed its three nationwide class action suits in this litigation in the United States District Court for the Eastern District of Pennsylvania. As a result of a ruling by the Judicial Panel on Multidistrict Litigation, Petitioner's cases were transferred to this Court for coordinated pretrial proceedings. Upon consolidation, this Court properly adopted the recommendations of the Manual for Complex and Multidistrict Litigation, particularly Section 1.9, which provides for the appointment of liaison counsel:

> "1.9 Liaison Counsel
>
> When there are several parties on one or both sides of the case represented by different counsel, the court is confronted with a problem in communicating with counsel and in securing responses from counsel on procedural questions. If these circumstances appear at the preliminary pretrial conference, the court should consider requesting counsel for the parties on each side to select one or more of their number as liaison counsel. If such counsel is selected he may be authorized by stipulation to receive notices on behalf of all counsel, to act as their spokesman at pretrial conferences, and should have the responsibility for calling meetings of counsel. These meetings may be for the purpose of agreeing upon responses to questions and suggestions of the court and for the purpose of initiating proposals, suggestions, proposed orders, proposed schedules, joint briefs and joint schedules during the pretrial proceedings, among other things."

Pursuant thereto, the court appointed three law firms within the Southern District of New York to act as liaison counsel on behalf of all subscriber plaintiffs, these firms being Parker, Chapin and Flattau; Liebman, Eulau, Robinson & Perlman; and Weil, Gotshal & Manges. (Hereinafter "Troika"). These firms, independent of each other, commenced more than ten actions in this litigation, none of which was brought as a class action, and were specifically retained as local counsel in two other cases. None of the Troika was retained as local counsel by Petitioner.

The clients represented by the Troika in their independent cases include Allied Stores, City Stores, W.T. Grant Stores, Spartan Industries, Interstate Department Stores, and J.C. Penney Co., almost all of whom have substantial transactions with defendants.

Throughout the pretrial proceedings in this multidistrict litigation, the Troika had never demanded nor even suggested that they would request as a fee a percentage of any recovery obtained in these class actions. Indeed if they had made such a request, their relationship with these class actions would have been clarified, that is, Petitioner would have specifically informed the Troika that Petitioner and only Petitioner represented the class actions, that Petitioner did not look to the Troika as counsel in the class action, and that Petitioner would not agree to any gratuitous fee being awarded to the Troika from a class action recovery. All of Petitioner's actions in this litigation have been consistent with and support the conclusion that Petitioner and Petitioner alone undertook and did represent the class representatives and the absent class members in this litigation.

It is solely in the posture of liaison counsel that the Troika now makes a demand for a share in any fees to be awarded by this Court in the event the proposed settlement is approved.

SUMMARY OF ARGUMENT

Petitioner opposes any award of attorneys' fees to the Troika from any recovery in these national class actions for the following reasons:

1. It was due solely to Petitioner's foresight and expertise that these actions were filed and prosecuted as class actions, thus enabling over 14,000 claimants who otherwise would be barred from recovery to recover.

2. At all times, Petitioner has been the sole counsel representing the class representatives and absent class members. At no time has the Troika represented the class actions.

3. Petitioner has never had any agreement with the Troika to pay the Troika attorneys fees. Petitioner has agreed to and in fact has reimbursed the Troika on a pro rata basis for out-of-pocket expenses common to all actions, such expenses relating principally to photocopying and printing of joint briefs.

4. The Troika represents its own clients in independent non-class actions. Its own clients have substantial transactions with the defendants. Whatever the Troika did substantively in this litigation, it did solely on behalf of

its own clients. The existence of these three national class actions has not caused the Troika to do any more legal work than it would have done absent these class actions. Moreover, Petitioner always acted to protect the interests of its own clients and the absent class members it represents.

4. The Troika was hostile to the class actions in that the Troika believed that these class actions conflicted with the interests of the Troika's clients and was a "stumbling block" to the progress of those cases. Indeed a letter (dated September 17, 1971) from a member of the Troika to all counsel for subscriber plaintiffs stated: "...It would appear certain that the class action settlements remove a considerable stumbling block to the possibility of disposition of our own respective cases upon satisfactory terms. ..." [Emphasis added]. And in open court, Mr. Brett, a member of the "Troika", advised the Court that the class actions "are a very limited application in terms of concern among the subscriber plaintiffs...." (Hearing of June 17, 1969, Transcript at p.47). Indeed, individual subscriber-plaintiffs felt that it was in their interests to have the defendants "defeat" the class actions.

5. As the Troika admits, the Troika had absolutely nothing to do with and contributed nothing and took no part in the establishment of the class actions, the negotiation of the settlement and the administration of the class action and the settlement.

6. The Troika relied upon Petitioner to sustain

these class actions for those clients represented by the Troika for whom the Troika failed to bring suit. Only by these class actions would such claims remain viable. They otherwise would be barred by the statute of limitations.

7. The Troika is being paid a fee by the clients they represent in their independent actions. Moreover, they may be receiving a fee from those claimants for whom they have entered an appearance in these class actions, a fee they otherwise would not receive. Hence, to grant this request would be to allow them double fees for their services.

ARGUMENT

A. PETITIONER AND ONLY PETITIONER WAS RESPONSIBLE FOR THE FILING, THE PROSECUTION AND THE SETTLEMENT OF THESE CLASS ACTIONS, AND ONLY PETITIONER IS ENTITLED TO AN AWARD OF AN ATTORNEY'S FEE FROM THE SETTLEMENT FUND.

In their avarice to share in any fee awarded from the recovery on behalf of the three national classes, the Troika has attempted to depict Petitioner as hanging on the proverbial coattails of the Troika and then at the appropriate time, stepping in and simply settling the class actions for the substantial sum of $10,000,000. Nothing could be farther from the truth. To the contrary, Petitioner protected the interests of absent class members by timely filing these three broad class actions and by diligently preparing and prosecuting these actions on behalf of the classes. At no time has Petitioner looked to other counsel, including the Troika, to perform legal services other than in a cooperative spirit that usually accompanies multidistrict coordinated litigation.

The fulcrum for the Troika's fee application is the opposition of plaintiffs to defendants' motion for partial summary judgment based upon the statute of limitations. In Petitioner's original papers in support of its fee application, Petitioner describes the role it played in defeating the summary judgment motion. Petitioner reiterates that position herein and submits concurrently herewith an Affidavit of David Berger, Esquire in opposition to the application of the Troika (hereinafter "Berger Affidavit No. 2). With respect to that important issue, Petitioner's contribution was as follows:

1. In the District Court, Petitioner prepared the initial draft of that portion of the brief arguing that the statute of limitations was tolled at least until July 11, 1968 (one year after the final judgment in the Government action was entered). (Berger Aff. No. 2, ¶3(a), Appendix C-1 to C-3). Among all counsel for all plaintiffs, it was Petitioner alone who insisted and persisted that the argument must be made that sections 5(a) and 5(b) of the Clayton Act are construed and applied independently of each other so that even though a decision and findings are made in a government case prior to the entry of final judgment, which decision and findings may be used as prima facie evidence under §5(a), the statute of limitations continues to toll for one year after the final judgment is entered. The Troika opposed this position in that it thought

it would prejudice an argument they would make later in the case regarding the application of §5(a). It is important to note that the decisions of this Court and the Court of Appeals adopted as their keystone this argument posited by Petitioner. This position was clearly pointed out in Petitioner's draft of the brief and later in Petitioner's letter of February 25, 1970 setting forth Petitioner's comments relating to the draft of the brief to be filed in the Court of Appeals.*/ (A copy of the letter is attached as Appendix "C-5" to Berger Aff. No. 2.

2. Petitioner worked with the Troika in preparing the Response to the Court of Appeals contra allowing an interlocutory appeal under 28 U.S.C. §1292(b).

3. In addition to what is set forth in paragraph 1 hereinabove, Petitioner worked with other counsel for plaintiff on the final version of the Appellee's brief submitted to the Court of Appeals. Petitioners attended every drafting session of such brief, all of which sessions were held in New York.

The Troika, in their affidavits, make a stunning misstatement of fact with respect to the argument in the Court of Appeals. Although it is true that the Troika did not wish Petitioner or anyone other than Mr. Hoffman (counsel for competitor plaintiffs) to argue, David Berger well before the argument date, informed both the Court and all counsel that he would present argument on behalf of the National classes. Indeed, in a letter dated March 12, 1970 (the Court of Appeals argument was scheduled for March 26) to all subscriber plaintiffs' counsel, a member of the Troika (A. Paul Victor) stated that Petitioner "has requested permission from the Court to argue the case on behalf of his own clients." (Appendix "C-7" to Berger Aff. No. 2). Hence, at least two weeks before the Court of Appeals argument, Mr. Victor advised all other counsel for plaintiffs that Mr. Berger would argue in the Court of Appeals on behalf of the national classes. Mr. Berger in fact argued in the Court of Appeals and responded to keen questioning, particularly by then Chief Judge Lumbard.

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*/ The draft of the brief in the Court of Appeals was prepared by Mr. Hoffman, counsel for a competitor plaintiff, and not by any member of the Troika.

4. Petitioner likewise took an active part in the preparation and drafting of the Answer to defendants' Petition for Writ of Certiorari. Prior to its preparation, Petitioner submitted to Mr. Victor a nine page letter suggesting how the Petition for Certiorari should be answered. Thereafter, Petitioner joined in drafting sessions of the Answer.

In light of the foregoing, it is irresponsible, as well as completely inaccurate, for the Troika to take credit for the successful opposition to defendants' applications relating to the statute of limitations (Troika Memorandum, p.31) and to characterize the role of the Troika as "the laboring oar" and the role of Petitioner as minor. Moreover Mr. Robinson's averment that "virtually all of the analyses, research and drafting in connection with the brief in opposition to defendants' petition for certiorari to the United States Supreme Court was done by the Troika" (Robinson Affidavit, ¶7, p.8) is an example of the Troika's reckless disregard for the facts. As set forth hereinabove, Petitioner's contribution to the defeat of the summary judgment motion was not only substantial, but critical.

It is perfectly clear from the papers filed by the Troika that anytime Petitioner took independent action to insure protection of the members of the classes, the Troika characterized that action as needless or distressing. One example is Petitioner's participation in the Court of Appeals. Another example is Petitioner's response to AFA's motion to dismiss. The Troika belatedly berates Petitioner for filing papers which Petitioner deemed necessary in order to defeat a motion to dismiss. Indeed, the Court's decision reflected the very position advanced by Petitioner.

From the time these national class actions were transferred to this Court, Petitioner's position has been that Petitioner and no one else was counsel for plaintiffs in these national class actions. Indeed in a letter dated November 5, 1968, Petitioner expressly advised a member of the Troika that he wished that his name "be added to the Steering Committee for the Subscribers." Moreover, upon receipt of a letter (November 10, 1970) from a member of the Troika advising Petitioner that "a meeting of lead counsel was held last week...", Petitioner wrote a strong letter (November 16, 1970) of protest that Petitioner was not given notice of the meeting. The letter stated in Part:

> "I was greatly disturbed and annoyed to learn from your letter of November 10, 1970 that a meeting of "lead counsel" had been held concerning the future progress of these actions and that our office was not apprised of such meeting. As you know, we have participated in every phase of this litigation, have attended and contributed to all similar past meetings, and have contributed heavily to the matters completed to date. Without regard to any nominclature as to "lead counsel", we have always taken an active role in all antitrust litigation in which we participate, especially where our clients, as here, are representative of national classes. I was surprised at your omission to notify us and hope that it was inadvertent. With respect to future meetings, I anticipate that we will be notified."

Indeed, Petitioner's every action in this litigation has confirmed his independence of representation in the national class actions. Petitioner's vigorous activity on behalf of the national class actions was essential; particularly since the Troika regarded the class actions as a "considerable stumbling block" and of "limited application in terms of concern among the subscriber-plaintiffs." Petitioner's sole concern with the interest of the national classes is in sharp contrast with the diametrically opposed interests of the individual subscriber-plaintiffs in whose belief a decision in favor of the defendants in the class actions would be in the interests of the individual subscriber-plaintiffs. (Berger Aff. No. 2 ¶6, p.7).

Aside from the foregoing actions taken by Petitioner in furthering the prosecution and successful conclusion of these three national class actions, the records clearly show that Petitioner did the following:

(1) Prepared, filed, prosecuted and brought to a successful conclusion three national class actions;

(2) Prepared the initial Rule 34 Request for Production of Documents (Berger Aff. No. 2, ¶2);

(3) Whenever any joint papers were to be submitted, Petitioner actively participated in their preparation;

(4) Attended and participated in every meeting of counsel, with one or two minor exceptions;

(5) Wrote a research memorandum on behalf of all plaintiffs' counsel, including the Troika;

(6) Did not rely at any time on the work of other plaintiffs' counsel, including the Troika. The only exception to this is the ministerial work performed by the Troika as liaison counsel, for which the Troika originally volunteered.

B. THE TROIKA HAS MERELY REPRESENTED ITS OWN CLIENTS AND, IN DOING SO, OPPOSED THE NATIONAL CLASS ACTIONS; ACCORDINGLY, IT IS NOT ENTITLED TO ANY FEE AWARDED FROM A SETTLEMENT OF THE NATIONAL CLASS ACTIONS.

In contrast to what Petitioners have performed and accomplished on behalf of three national classes, the Troika (believing the elimination of the class actions to be favorable to the individual subscriber-plaintiffs) has performed no work that it was not obligated to perform in the representation of its own substantial clients -- with, of course the exception of the administration work as liaison counsel. See ¶15 of Affidavit of Joel E. Hoffman, Esq., counsel for competitor plaintiffs). Stated in other terms, the pendency of these class actions caused the Troika to do no more work than it otherwise had to do in representing its own clients.

In a recent decision in the plumbing fixture antitrust cases, Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Santiary Corporation, C.A. 41774 SC (E.D. Pa., Opinion dated April 28, 1972), Judge Harvey denied applications identical to those made herein by the Troika. In plumbing fixtures counsel for plaintiffs who were not class representatives, but who had brought separate actions on behalf of their own clients, applied for a fee to be awarded from the class action settlement. The basis for their application was that although they did not represent the class, their participation in the multidistrict litigation contributed to the class action settlement. Moreover, all their clients were sharing in the class action Settlement Fund. The Court denied the application of the non-class action counsel, concluding:

> "...[I]t is not disputed that petitioners Kohn and Berger provided the leadership for the class from beginning to end. Whatever contribution others made to the creation of the fund was minor when compared to that of Messrs. Kohn and Berger. As discussed more fully hereinbelow, each such petitioning attorney has been

> adequately compensated by fees to be paid him by his clients, or for other reasons is not entitled to an award from the Court." (Slip Opinion, at p.29).

In the case at bar, the Troika unquestionably represents large corporate clients with substantial transactions with the defendants. Although the Troika has not disclosed its fee arrangements with these clients, it is clear that they are receiving either an hourly rate for their representation or are retained on a contingent fee basis. Moreover, members of the Troika have entered their appearance in the class action on behalf of approximately 55 claimants who have responded to the class action notice by filing statements of claim. Again they have not informed the Court of their fee arrangements with such claimants. Accordingly, the members of the Troika already have or will receive substantial fees from their clients who have brought independent suits and undoubtedly as well from their clients who have filed claims in these class actions.

The Troika admits, as indeed it must, that it did not participate in any way whatsoever in the class action aspects of this litigation nor in the settlement discussions and negotiations which resulted in the proposed settlement. Nor have they participated in any way in the conduct of the class action litigation, including the administration of claims. Their sole claim for a fee rests on the fact that they are liaison counsel, not lead counsel as they suggest, and that they cooperated with other counsel, including Petitioner, in certain joint proceedings.

The Troika, aside from voluntarily assuming the role of liaison counsel -- it was proper for them to do so since they are all located within the Southern District of New York --have performed no acts in this litigation except for the benefit of their private clients. The mere fact that some preparation of this case was done in cooperation with other counsel does not entitle them to a fee from other counsel's cases. It would be more logical to argue that Petitioner is entitled to a fee from any recovery obtained in the Troika's independent cases, since the Troika candidly concedes the settlement of the class actions has advanced the Troika's independent cases to the possibility of a favorable disposition.

Even in the best light, the Troika's application can be deemed only to be an "after-thought", an attempt to glean an attorneys' fee from three class actions commenced, prosecuted and successfully concluded not by them, but by Petitioner. Indeed the foresight of Petitioner in bringing these class actions preserved the claims of a substantial number of the Troika's clients on whose behalf the Troika failed to bring timely actions. Moreover, to the extent that the Troika has fee agreements with the approximately 55 claimants who filed claims in these class actions, the successful prosecution of these class actions has enabled the Troika to receive fees it otherwise would not have received.

The three law firms now eagerly seeking as a "Troika" to obtain a share of the class action fee were strangely reluctant to assume any burden or responsibilities for the prosecution of the class actions:

(1) They filed over 10 complaints. Not a single one sought recovery, except on behalf of the named plaintiffs.

(2) They gave no actual or psychological encouragement to the prosecution of the class actions which they candidly characterized as a "considerable stumbling block" to their clients' cases and of "limited application in terms of concern among the subscriber-plaintiffs." Indeed, individual subscriber plaintiffs have expressed the desire that the class actions would be defeated by the defendants.

(3) They never participated in planning or executing the class action strategy much less the class action tactics.

(4) They prepared no class action memoranda, briefs, amendments or anything else relevant to the class actions.

(5) They appeared at no class action arguments or court appearances.

(6) They did not argue in support of the class actions.

(7) They did not initiate or participate in any class action settlement discussion. Their contribution to the proposed settlement is literally zero.

(8) They have not participated in any way in the administration of the class actions.

(9) Though they shunned the class actions in their zeal to protect only their affluent individual clients, once the settlement was announced, they strangely responded to the notice with approximately 55 claimants to the settlement fund.

(10) They now seek what would undoubtedly be a double fee -- one for their work in representing their own clients, and another as tribute to their having been designated liaison counsel.

In light of the foregoing -- that Petitioner was solely responsible for the filing, preparation, prosecution and settlement of these three national class actions and that the Troika acted only in furtherance of its own clients' independent actions -- Petitioner urges this Court to deny the application of the Troika to share in any attorneys' fees awarded by the Court from the class action settlement fund.

II.

RESPONSE TO APPLICATION OF WALD, HARKRADER AND ROSS FOR APPORTIONMENT OF COUNSEL FEES

The firm of Wald, Harkrader and Ross, through Joel E. Hoffman, Esquire, has made an application for counsel fees to be awarded from the class action settlement. Petitioner strongly opposes this application for the same reasons advanced in opposition to the application by the Troika, and in addition, for the following reasons:

(1) Wald, Harkrader and Ross ("W H & R") were counsel

for competitor plaintiffs and, accordingly, have had, since the inception of this litigation, an interest adverse to and in conflict with the interests of the class members. This adverse and conflicting interest was aptly described by liaison counsel for competitor plaintiffs at the hearing of June 17, 1969:

> "Mr. Kelly: ...The damage period claim begins in April of 1957. Now our position on discovery will be that we will want to go back through these entire periods and examine all the elements of the head-to-head competition that went on through this period, every contract we lost, every contract we got at a depressed price by reason of the defendants' predatory price practices.
>
> Contrast that, if you will, your honor, with what the subscribers are interested in. I don't think that even if you take the same witness and put him on the witness stand that they will -- surely they will be interested, but they won't go into the same details of the day-to-day competition. They represent subscribers who had stores, or one store, or a number of stores, in the Milwaukee area and they entered into a contract for service in that area and they are interested in, perhaps, the price that they got and why they may not have received a better price.
>
> The fact of the matter is, your Honor, I think that in the competitive cities they received a favorable price --...."

With such a blatant conflict with the claims of class members, it is shocking that a counsel for a competitor plaintiff is requesting a fee from subscriber plaintiffs.

(2) This application, like that of the Troika, is an afterthought which if granted, would result in W H & R receiving a double fee. As Mr. Hoffman admits, his "competitor" case was settled after the Court of Appeals' decision (Hoffman Aff., ¶13). However, Mr. Hoffman does not disclose the amount of the settlement nor the amount of the fee received by W H & R from their own clients. More important, Mr. Hoffman does not disclose whether he requested a fee or received a fee from any of the other competitor plaintiffs who settled their cases and who did not retain Mr. Hoffman as their counsel. The fact is that W H & R did not request nor did they receive any fee from David I. Shapiro, Esq., counsel for some competitor plaintiffs. Nor, it is believed, did they request or receive a fee from the settlement reached in the State of New York (subscriber-plaintiff) action.

Accordingly, the motive of W H & R is obvious. They see a large class action settlement and now, with no prior indications to anyone, they request a fee from that substantial fund.

Moreover, the limited work which Mr. Hoffman performed was performed for his own client. Indeed, Petitioner was ready, willing and able to argue the statute of limitations issue on behalf of the classes and on behalf of other subscriber plaintiffs. This was essential. Petitioner was well aware that Mr. Hoffman's interests were adverse to those of the subscriber plaintiffs. Indeed, the Troika must also have known of his conflict of interests. Yet the Troika supinely sat by and did not participate in the argument. It was only due to Petitioner's unrelenting persistence that Petitioner was able to represent personally the class actions at oral argument. It appears now, using hindsight, that Mr. Hoffman's motives were to attempt to create a basis for claiming a fee in other cases. This was never represented to other counsel by Mr. Hoffman, and Petitioner never understood, prior to the filing of the W H & R fee application, that W H & R ever intended to request a fee.

It is apparent that counsel in non-class action cases have adopted the attitude that because these successfully concluded class action cases require an award by the Court of an attorney's fee, they have nothing to lose in applying for a portion of that fee. However, their applications are only disruptive of the class action proceedings and have no basis whatever in fact or law. Accordingly, they should be denied.

III.

THE APPLICATIONS FOR ATTORNEYS FEES BY THE TROIKA AND BY W H & R SHOULD BE DENIED IN THAT THEY DO NOT COMPLY WITH SETTLEMENT ORDERS, NOS. 1 AND 2

Settlement Order No. 1 provided that applications for counsel fees shall be filed by March 21, 1972. This date was extended by Settlement Order No. 2 to April 21, 1972. Counsel for class representatives (Petitioners) filed their application on that date and so notified the members of the class. The Troika and W H.& R filed their applications for attorneys' fees on or around May 12, 1972. As such, their fee applications are late and for that reason alone must be denied.

More important, claimants have not received notice that these applications have been filed. Thus the Troika and W H & R are not only in violation of this Court's settlement orders, but are also in violation of Rule 23 and have blatantly disregarded the rights of class members to have notice of their fee applications.

The Court required that the original notice to all potential class members give notice of Petitioner's intention to request an award of attorneys' fees in the amount of 25% of the settlement fund. This was done. Further notice was given when the actual application was filed. In contrast to this, the Troika and W H & R have given no notice. Indeed, their disregard for the class actions during the pendency of these suits is equalled by their disregard of the class action rule and Court Orders since the proposed settlement.

For these reasons alone, the fee applications of the Troika and W H & R should be denied.

IV.

RESPONSE TO OBJECTIONS OF GENERAL MOTORS, ET AL.; HUMBLE OIL REFINING COMPANY, ET AL.; AND AMERICAN CYANAMID CORPORATION

BACKGROUND

Petitioner has taken the liberty to group these objectors to the petition for attorney's fees (hereinafter collectively "objectors") into a category of "antitrust defendants." Such classification is not arbitrary. A quick perusal of the index of cases reveals at least fourteen separate antitrust suits by the Department of Justice against these objectors and more than 80 private antitrust suits against these defendants (many of which were commenced as class actions). Moreover, Petitioner himself represents plaintiffs in current litigation against these "antitrust defendants", many of which cases were commenced as class actions.

Against this background, these objectors, all of whom are satisfied with the proposed settlement, have attacked Petitioner's fee application. Leaving aside excessive advocacy and their penchant for hyperbole, the objections of these industrial giants come down to this:

(1) Objectors characterize these as cases in which victory to the plaintiffs is as inevitable as "staking and pursuing a claim in a goldmine that the government already had discovered." (General Motors memo, at p.16). Thus they say, there was no contingency and accordingly, no large fee is deserved.

(2) Objectors emphasize that the number of hours expended should govern the amount of a fee, thus ignoring the efficiencies and economies employed by Petitioner and discounting any result obtained for the benefit of the classes.

As the Court knows, Petitioner's fee request is to be paid out as the defendants pay the entire amounts due, with interest, over a period of 4 years. Contrary to the simplistic, 40-40 hindsight views of these objections:

(1) The risks of this litigation from its outset were great and continue to be great until this settlement is approved.

(2) The benefits conferred upon the class members by the timely commencement, prosecution and settlement of these three national class actions are very substantial. To overemphasize the hours spent and to de-emphasize the result is to encourage plaintiff's counsel in private antitrust suits to delay settlement until the eve of trial, to work to accumulate unnecessary hours, to practice law inefficiently, all with the aim of assuring that plaintiff's counsel will be awarded a large fee. This position, we submit, is abhorrent to the Courts and the bar and contrary to the compelling principles behind encouraging private enforcement of the antitrust laws.

(3) Petitioner's request is commensurate with awards in similar antitrust cases, particularly those in the location where Petitioner practices law.

ARGUMENT

A. THE RISKS INVOLVED IN THIS LITIGATION WERE GREAT; ACCORDINGLY, THE CONTINGENCY OF ANY RECOVERY ON BEHALF OF THE CLASS WAS GREAT.

As pointed out already, these objectors to Petitioner's fee application characterize these class action cases as merely mining "a gold mine that the government already had discovered." (General Motors and Ford memo, at p.16). They assert that Petitioner had nothing to do to achieve the result; they say the government did it all. The short answer to this is that the government did not bring this Settlement Fund into existence*/; only Petitioner did.

Moreover, General Motors and Ford, having transactions with defendant in excess of $6.7 million, clearly had a sufficient interest in this litigation to initiate and prosecute their own cases. Yet they took no such action. Instead, they sat supinely by and allowed the statute of limitations period to expire and bar their claims. Now that they have been rescued from the horrendous results of their own inactivity, as they seek their aliquot share in the $10 million fund created by Petitioner alone, they attempt to belittle petitioner's services and the results achieved. Despite their army of high priced legal counsel throughout the United States, they chose not to pursue what they now label a certain recovery. And, of course, they did not undertake to represent the multitude of claimants smaller than themselves. One must ask, why? From the standpoint of these objectors, in their considered judgment, the risks of litigation did not warrant the expense of litigation.

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*/ Indeed, the government has not yet even succeeded in bringing about a settlement of its own claim for damages in this very case.

Indeed, the stark fact is that solely as a result of Petitioner's foresight and diligence in filing and prosecuting these class actions, these objectors will receive substantial shares in the settlement fund at very minor expense and with no risk whatsoever. For example, Ford and General Motors will recover in excess of $200,000. Out of this windfall, they are being asked to permit the deduction by way of fees of approximately $50,000 -- a small sum by comparison with what they undoubtedly would have paid in independently litigating their claims.

Petitioner's memorandum in support of the proposed settlement sets forth the hazards and uncertainties that attended this litigation and need not be repeated here. Moreover, those hazards and uncertainties exist until the proposed settlement is approved by this Court.

However, what does need comment is General Motor's and Ford's argument (in fact, "a defenant's brief") attacking the use of class actions in enforcing the antitrust laws. The arguments advanced by this category of objector cogently demonstrates that the efforts of these objectors have not been directed toward antitrust violators, but against antitrust enforcers.

General Motors and Ford's assertion that the dynamics of a class action in antitrust litigation insure a multimillion dollar settlement is belied by the actions of these very parties in the role of antitrust defendants. Thus, in class actions by state, county and local governmental entities charging General Motors, Ford and others with conspiring to delay and impede the development and installation of automotive air pollution control devices, In re Motor Vehicle Pollution Control Equipment, (C.D. Cal., MDL Docket No. 31)*/ Counsel for General Motors at the outset emphatically told the District Court there would be no settlement of the cases. In re Motor Vehicle Air Pollution Control Equipment, Hearing of April 27, 1970 (Transcript at p.35). Moreover in the celebrated case of Eisen v. Carlisle and Jacquelin, (S.D.N.Y. 66 Civ. 1265 HRT), where the Court has indicated the treble damage exposure in a national class action may be $60,000,000, the New York Stock Exchange has adamantly refused to settle. Going back to the Electrical Equipment class action cases, even defendants who had pleaded "guilty" to criminal indictments insisted on a number of trials before they undertook any additional settlements.**/

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*/ The case has been pending more than two years and has been in active pretrial proceedings from the start.

**/ Other class action cases where antitrust defendants are (Continued)

The fact is that the defendants in this very case have been vigorously litigating it for 11 years. Nothing in their conduct of the litigation indicates a tendency to roll over and play dead. Represented by eminent counsel, the defendants have not yet settled the remaining litigation brought by the individual subscriber plaintiffs.

That defendants have throughout regarded the cases of the competitor plaintiffs to be the most vulnerable (from defendants' point of view) is proven not only by their words (see defendants' memo in support of settlement) but by their actions (their earlier settlement of the competitor plaintiffs' cases).

It is apparent that these objectors have not read or understood the Government action. Indeed, they would have been the loudest to proclaim the lack of liability to these class action plaintiffs had they been in the position of these defendants. It takes little imagination on the part of Court or counsel to envisage these very objectors loudly proclaiming (as they constantly do when cast in their usual roles of antitrust defendants) that the classes must not be upheld because of individual variations and lack of manageability; that even

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(Continued) adamantly refusing to settle include, for example, *State of Connecticut v. General Motors Corp.* ("auto fleet discounts"); *City of Phila. v. Emhart Corp.* ("Master keys"); *In re Ampicillin Antitrust Litigation.*

if upheld, only those members of the class who actually relied upon the class are not barred by the statute of limitations; that liability cannot be proven; that impact cannot be shown; and that damages cannot be proven while at the same time demanding a jury trial as to each of the more than 14,000 claimants in the class, even should liability and impact be established in the class actions.

It is clear that this category of objector appears here not because of an asserted interest in Petitioner's fee but in reality as an opportunity to advance their primary interests as an antitrust defendant. Indeed, one objector, Humble Oil & Refining Company ("Humble") recently objected to the fees requested in the plumbing fixtures cases, Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corporation, (E.D. Pa., Civil Action No. 41774 SC) (Opinion dated April 28, 1972). Therein, Mr. Simon, counsel for Humble therein as well as in these cases, told Harold E. Kohn, Esq., counsel for class representatives therein, that his reason for objecting to the fee application "was not because the fee in the plumbing case was of any particular moment to Humble, but because of the interest of Humble as a defendant in other antitrust litigation where they have been concerned about the development of class suits."[*] (See affidavit of Harold E. Kohn filed of record in Lindy Bros. v. American Radiator, etc., annexed hereto as Appendix "A").

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[*] Humble's repeated attacks on plaintiffs' counsel fee applications in its asserted capacity as a class action claimant may well come within the interdiction enunciated by the Supreme Court in California Motor Transport Co. v. Trucking Unlimited, ____U.S.____, 92 S.Ct. 609,613 (1972).

In addition to the normal hazards of complex antitrust litigation, commencing a law suit as a national class action multiplies not only the risks but the responsibilities of counsel for the class representatives. He cannot proceed in the same manner as if he were merely representing one or two clients. The class action enormously increases the attorney's tasks with respect to (1) preparing the case for trial; (2) gaining judicial certification of the class action; and (3) managing the class action. Although the results at the time the litigation is commenced are completely uncertain, once the class action is alleged, counsel has committed himself to represent that class, regardless of what additional risks and hazards arise during the course of litigation. Rothman v. Gould, 14 F.R. Serv. 2d 1541, 1542 (S.D.N.Y. 1971):

> "In a word, having nominated themselves as class representatives, both plaintiff and his counsel have undertaken responsibilities, and triggered possible consequences, that may not now be erased by routine acceptance of the resignation they now tender. ..."

The objectors were unwilling themselves to accept the risks of litigation but are eager to accept the consequences and benefits resulting from petitioner's willingness to file and prosecute these class actions subject to the inherent risks which accompany this type of litigation. Their attempts at this point to minimize the risks of litigation, particularly in light of the class actions are but forty-forty hindsight and come with ill grace. To the contrary, the risks that petitioner assumed were intensified by undertaking the prosecution of these suits as class actions.

B. POLICIES OF JUDICIAL ECONOMY AND ENCOURAGEMENT OF PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS, TOGETHER WITH THE BENEFICIAL RESULTS ACHIEVED FOR THE CLASSES, RATHER THAN THE AMOUNT OF HOURS LOGGED, ARE THE PROPER STANDARDS TO EVALUATE PETITIONER'S SERVICES.

Objectors to Petitioner's application for an award of attorney's fee look solely to the number of hours logged by Petitioner's firms in prosecuting these class actions; they ignore the results achieved and the economies and efficiencies employed by Petitioner in successfully prosecuting these actions. The stark fact is that these cases were, and still are, not only contingent but highly controversial in nature. The best evidence of this is the controversy over the amount of the class representative counsel's fee and who, if any one, should share in it. This is true even with respect to some of the claimants who eagerly seek their aliquot share in the settlement Fund.

Petitioner was not paid on an hourly basis. Petitioner did not receive compensation during the years this litigation has continued. Nor did or does Petitioner know whether he will receive any compensation unless he successfully produces an acceptable result. Nor will Petitioner receive any compensation other than that allowed by the Court when this litigation is concluded. All the substantial elements of overhead which accompany antitrust class actions were and will continue to be present. This situation obviously enco ages economics of effort and time and thus contributes to an improvement in the administration of justice. Petitioner has confronted batteries of eminent defense counsel. Petitioner has used para-legal assistants, closely supervised by attorneys, to do work which could easily have been assigned to lawyers to magnify the number of lawyer-hours involved.

These economies of time and effort are diametrically opposed to the dragging out of litigation. Petitioners have throughout been mindful of the wise warning preceding the Forward to the Manual For Complex and Multidistrict Litigation:

> "There are no inherently protracted cases, only cases which are unnecessarily protracted by inefficient procedures and management." [Emphasis added].

Petitioner has throughout avoided "protracting" this litigation by unnecessary or inefficient procedures or management. At the same time, Petitioner has been able to protect the interests of both private and public claimants who could not afford to pay the usual hourly rate. (See affidavits of Ralph Lynch, Jr. and Mr. Seitel).

In Cape Cod Food Products, Inc. v. National Cranberry Association, 119 F.Supp. 242 (D.Mass. 1954) (cited in Petitioner's main brief, p.13), Judge Wyzanski was considering the fixing of a reasonable attorneys' fee under Section 4 of the Clayton Act.*/ He put it this way:

> "... The rate is the free market price, the figure which a willing, successful client would pay a willing successful lawyer. Sometimes the figure may seem high...."

Here the evidence is overwhelming that the figure which a willing successful client would pay a successful lawyer is what Petitioner is seeking. This is shown by the fact that 98.9% of all the members of the classes (almost 14,000 in number) do not oppose petitioner's fee request.**/

Petitioner submits that what the Hon. J. Lee Rankin, Corporate Counsel of the City of New York, recently wrote to the Board of Editors, Manual for Complex and Multidistrict Litigation, is expressly here applicable:

> "I will not repeat here what I have elaborated in my affidavit about the reasons why private counsel are essential to the success of this kind of litigation and why the prospect of seemingly generous compensation in successful cases is essential to the participation of counsel of the calibre of those who represent the entrenched economic interests against whom these cases must be brought in the public interest. I do wish, however, to emphasize several factors that I believe should be mentioned prominently in any general discussion such as appears in the draft Manual.

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*/ Fees awarded out of a fund are more generous than fees awarded under §4 of the Clayton Act. See Petitioner's main brief at p.62.

**/ As the Court knows, explicit ample notice of Petitioner's fee application has been given to the class.

. . .

> First, while it is true that class representation is a public service, I believe that that element should tend, if anything, to increase rather than decrease counsel's compensation. Otherwise, the most able private counsel will turn -- as they traditionally have -- to more lucrative defense work at the expense of the public interest."

In light of the foregoing, these objections fall flat. The fact is that whatever had to be done, Petitioner did. It is performance that counts. The result -- acceptable to the objectors -- is a result accomplished by Petitioner. No objector contributed to the result. Petitioner alone accomplished this result in which more than 14,000 class members will share. We submit that the Court should reward the economy and efficiency of time expended by Petitioner. While such objectors as G.M., Ford et al. may be unaccustomed to performance with such economy of time, we believe that sound public policy should place a premium on results rather than on hours logged.

Accordingly, the fee requested by Petitioner is proper and in keeping with the results achieved.

C. PETITIONER'S FEE REQUEST IS COMMENSURATE WITH AWARDS IN SIMILAR ANTITRUST CLASS ACTIONS, PARTICULARLY IN THE LOCATION WHERE PETITIONER PRACTICES LAW.

Many of the cases on which Petitioner relies were decided in the Eastern District of Pennsylvania, the district where these class actions were originally filed and where, for purposes of trial, they still lie. Accordingly the Eastern District of Pennsylvania decisions cited by Petitioner[*/] should be controlling. Most recently, the Judicial Panel on Multidistrict Litigation, In Re Plumbing Fixtures Litigation, Docket No. 3 (*State of North Carolina v. American Standard, Inc.*, E.D.N. Car., C.A. 2844) (Opinion and Order dated May 5, 1972, expressly held that "the substantive law of the transferor forum will apply after transfer [under 28 U.S.C. §1407], *Van Dusen v. Barrack*, 376 U.S. 612 (1964)." Moreover, Disciplinary Rule 2-106, ABA's Code of Professional Responsibility, states as a factor in determining the adequacy of a fee: "(3) The fee customarily charged *in the locality for similar legal services*." [Emphasis added].

The cases previously cited by Petitioner were recently given further support in *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, CCH Trade Reg.Rep. ¶73,953 (E.D.Pa., April 28, 1972). In that multidistrict litigation (where some 370 separate cases were commenced) counsel for the class representatives petitioned for an award equal to 33-1/3% of that portion of the settlement fund to be distributed to those class members who were sharing in the settlement

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[*/] See Petitioner's main brief, pp.58-60, wherein the following cases are cited: *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 47 F.R.D. 557 (E.D.Pa. 1969); *City of Phila. v. Interpace Corp.*, (E.D.Pa., C.A. 43008); *City of Phila. v. General Host Corp.*, (E.D.Pa., C.A. 68-704).

solely as a result of filing a claim pursuant to the class notice. The Court awarded a fee in the amount of 20% from that portion of the settlement ($6,873,250), lowering the percentage because petitioners therein were receiving an additional fee of $802,707 from clients with whom they had fee agreements.*/ Of the portion of the Settlement Fund ($11,554,375) from which petitioners therein were entitled to an award of fees, the total fees awarded out of the fund including the 33-1/3% agreed to by petitioners' clients, equalled $2,992,000 or 25.89% of that portion of the settlement. The fees retained by counsel for class representatives represented approximately 19% of the $11-1/2 million portion of the settlement.*/

The situation in the plumbing fixtures case with respect to petitioner's fee agreements with his clients is not present here. Although petitioner has fee agreements with his clients ranging from 25% to 33-1/3%, Petitioner has informed the Court that he will accept from his clients the same fee which the Court awards. Thus, Petitioner seeks to avoid a situation where class representative plaintiffs will pay a higher fee than non-litigating class members.

Accordingly, the precedent established in the cases from the Eastern District of Pennsylvania support Petitioner's fee application.

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*/ The fee agreements with these clients for the most part were contingency fee agreements in the amount of 33-1/3%. This produced a total fee from these clients of approximately $1,558,000. However, after fees to affiliated counsel, Petitioners therein received $802,707.

In any event, awards of 25% of the amount recovered, as a reasonable attorneys fee are not uncommon in this district. Thus Hornstein, in his leading article "Legal Therapeutics: The Salvage Factor in Counsel Fee Awards" 69 Harv. L. Rev. 658 (1956) states that "in the New York state courts, specific fees of 25% have been awarded in several cases each of which involved a judgment or settlement of approximately $2,000,000." P. 667. In Norte v. Huffines, 62 Ci. 3390 (S.D.N.Y. 1970) Judge Mansfield awarded legal and accounting fees of $1,000,000 in a securities case in which the damages awarded were $4,200,000 stating that the "slightly under 24 per cent of the total amount of recovery" was "not out of line, after taking all of these factors into consideration, with what is normally expected at the conclusion of a contingent suit that has been successful" (Pp. 7-8 of transcript of hearing on October 16, 1970).

D. THE OBJECTIONS OF HUMBLE OIL & REFINING CO. ARE WITHOUT MERIT; INDEED, THEY HAVE RECENTLY BEEN REJECTED IN THE PLUMBING FIXTURES LITIGATION.

As previously noted, objector Humble Oil & Refining Company, represented by the same defense counsel, filed objections to the fee award in the Plumbing Fixtures litigation almost identical to the objection filed in the cases sub judice.* The objections there, as we respectfully suggest they should be here, were rejected. (See Sl. Op., pp. 16-18).

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*/ Counsel for objector Humble, et al., completely misrepresents the award by the Court in that case, when Humble states: "...the Court's award there constituted about 5% of the Fund in Plumbing Fixtures."

Powell v. Pennsylvania Railroad Co., 267 F.2d 241 (3rd Cir. 1959) puts to rest the contention that it is the litigant himself and not the lawyer, who is entitled to the award of fees. The successful appellants in Powell were the attorneys themselves, not the litigants. Indeed, that issue was disposed of long before in Central Railroad & Banking Co. of Georgia v. Pettus, 113 U.S. 116 (1885), as follows: "...when an allowance to the complainant is proper on account of solicitors' fees, it may be made directly to the solicitor's themselves without any application by their immediate client."

And, in City of Wewoka, Okl. v. Banker, 117 F.2d 839, 844 (10th Cir. 1941), cited at page 36 of Humble's Memorandum, the attorney seeking a fee sued directly and it was held on appeal that: "The court properly ordered the fee paid direct to the solicitor."

The fact that the Court established a settlement class, does not justify Humble's assertion that: "...as class representatives for settlement purposes only, counsel assumed no risk in behalf of the class" (Humble Memorandum, at p. 5). These three actions were the only national class actions filed on behalf of subscriber plaintiffs. Under Kahan v. Rosenstiel, 424 F.2d 161, 169 (3rd Cir. 1970) that action is presumed to be a class action until a determination to the contrary and counsel for the class throughout have dealt on behalf of and in the interests of the class.

Humble does not challenge their accomplishment, nor repudiate the benefits conferred.

In State of Illnois v. Harper & Row Publishers, Inc., supra, in which Judge Decker approved a counsel fee award of approximately 20% of the recovery, in a class action on behalf of a national class of public bodies (in contrast to the private entrepreneurs here who constitute the overwhelming percentage of the class), the State of North Carolina sought to avoid paying any fee, as a member of the class, just as New York City unseccessfully tried to do in the brass mill tube and pipe case before Judge Fullam. The following colloquy discloses Judge Decker's reasoning in rejecting North Carolina's position, equally applicable to Humble's position here:

> "THE COURT: But the cases also say that if you accept the benefits, you also accept your share of the burden, by accepting that.
>
> MR. BENOY: We are willing to accept our share of the burden.
>
> THE COURT: Doesn't that seem fair? I mean why do you limit your share of the burden to the costs alone?...The fund was produced, I take it, at least that's the theory of it, by the efforts of counsel in your behalf as well as every body else's...
>
> * * *
>
> THE COURT: I assume that every time that he [counsel for the class] was in court he was in court for you as well as everybody else.

MR. BENOY: Oh, but he was not in court for us as well as everybody else, your Honor. He was in court for his clients that retained him and he had a duty to represent them adequately and properly, and, as soon as this class action notice -- as soon as the class action was established, North Carolina entered its appearance on behalf of these public institutions and the next public notice which we received from the Court, said that there is an offer of settlement and come in and object or get out, opt out and forget it.

THE COURT: Well, you understand that in a class action the accepted procedure is to at least decide that the attorney prosecuting the action, the fact that some determination has to be made that he can adequately represent the members of the class, and this is -- it is the whole class; that includes you.

MR. BENOY: Yes, sir.

THE COURT: You can't just exclude yourself; say that he represented everybody but you.

MR. BENOY: Well, may it please the Court, suppose that we had done this, suppose we had opted out under Rule 23, as we have a right to do --

THE COURT: If you had opted out, you wouldn't be here today and you wouldn't be getting whatever you are getting, the five percent.

MR. BENOY: Yes, sir.

THE COURT: If you want to forego that, that will solve the whole problem here today."
(Transcript of 9/25/70 in No. 67 C1899, at pp. 18, 20-21).

Petitioners' original memorandum has already cited decisions to the effect that the hours spent are not controlling in awarding fees in litigation of this nature. This is supported by the Third Circuit in Powell, supra, as follows:

> "There have been cases in which it was contended that the case was a simple one and that there was little litigation or time spent. In Woodbury v. Andrew Jergens Co., D.C., 37 F.2d 749, 750, the Court stated that:
>
> 'The value of a lawyer's services is not measured by time or labor merely. The practice of law is an art in which success depends as much as in any other art on the application of imagination -- and sometimes inspiration--to the subject-matter. The exercise of these faculties may occur at any stage in a case, though their influence on the course of the proceedings may not be established till its outcome. In order, therefore, accurately to chancer the value of a lawyer's services, one must almost always examine them in the light of the event.'" 267 F.2d at p. 246.

Judge Fullam's rationale for awarding fees in Philadelphia Electric Co. v. Anaconda American Brass Co., supra, using the "therapeutic value" approach to the award, is precisely the approach approved by the Supreme Court in Mills v. Electric Auto-Lite Company, 396 U.S. 375 (1970). That case involved the federal securities laws, rather than antitrust, but the public policy is the same. The Supreme Court held that an award of counsel fees was justified for establishing a violation of the proxy rules, even though no monetary recovery was made on behalf of the class, since: "Regardless of the relief granted, private stockholders' actions of this sort 'involve corporate therapeutics.' and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute." 396 U.S. at p. 396. This view was fully endorsed by the Third Circuit in Kahan v. Rosenstiel, 424 F.2d 161, 166 (3rd Cir. 1970).

The "evidentiary hearing", said by Humble to be essential, would add nothing of significance to the record before the Court. The petitioner has already filed a lengthy affidavit setting forth the work performed and the hours spent up to that time. The record fully discloses the extent and nature of the services rendered to the class.

In Powell, supra, the Third Circuit quoted with approval 7 C.J.S. Attorney and Client §191d, p. 1093, to the effect that: "...the court, either trial or appellate, is itself an expert on the question, and may consider its own knowledge and experience concerning reasonable and proper fees, and, in the light of such knowledge and experience, the court may form an independent judgment from the facts or evidence before it, as to the nature and extent of the services rendered, and make an appraisal of such services and determine the reasonable value thereof, either with or without the aid of testimony of witnesses as to value."

267 F.2d at 245. See also Tranberg v. Tranberg, 456 F.2d 173, 175 (3rd Cir. 1972) (Court may decide fee application "without hearing expert testimony on the subject."); Lindy Bros. v. American Radiator & Standard Sanitary Corp., supra. The relevant facts are before the Court on the Petition of Counsel for the Class.

CONCLUSION

Accordingly, in light of all the circumstances involved herein, petitioner urges that petitioner's fee application is fair and reasonable and respectfully requests that the petition be granted.

Respectfully submitted,

David Berger, P.A.,
Attorneys-at-Law

By:

David Berger
H. Laddie Montague Jr.
1622 Locust Street
Philadelphia, Pennsylvania
19103

Of Counsel:

Lord, Day & Lord
Herbert Brownell
Gordon B. Spivack
25 Broadway
New York, New York 10004

Harold E. Kohn, P.A., Attorneys-at-Law
Harold E. Kohn
1700 Market Street
Philadelphia, Pennsylvania

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LINDY BROS. BUILDERS, INC. of PHILA., et al.,	:	
Plaintiffs,	:	
	:	CIVIL ACTION NO.
v.	:	41774 SC
AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, et al.,	:	
Defendants.	:	

COMMONWEALTH OF PENNSYLVANIA
: SS.
COUNTY OF PHILADELPHIA

AFFIDAVIT OF HAROLD E. KOHN RE OBJECTIONS OF FRIENDSWOOD DEVELOPMENT COMPANY AND HUMBLE OIL & REFINING COMPANY

HAROLD E. KOHN, being duly sworn according to law, deposes and says:

During the month of March I have had occasion, in other active antitrust litigation where Humble is a defendant and I am representing plaintiffs, to speak to William Simon, Esquire, of Howrey, Simon, Baker & Murchison, counsel for Friendswood Development Company and Humble Oil & Refining Company in this above captioned matter.

EXHIBIT A

During the course of these conversations, Mr. Simon told me that Humble intended to file objections to my petition for allowance of counsel fees here. When I inquired as to the reason for doing so, he said it was not because the fee in the plumbing case was of any particular moment to Humble, but because of the interest of Humble as a defendant in other antitrust litigation where they have been concerned about the development of class suits. I told him I thought this was improper; that where they represent a claimant in a plaintiff class, they ought not to try to serve their antagonistic interests as counsel for a defendant elsewhere under the guise of representing a claimant in a plaintiff class. I told him I did not care how hard he fought me in a case where he was counsel for a defendant, but that this kind of Machiavellian tactic was not being candid with the Court.

Mr. Simon said he would consider the matter further with the client. In a subsequent conversation he told me that they had decided to proceed with the objections, because of their frequent participation in antitrust litigation, so that they felt they had "to straighten out class suit law".

I told him I could only repeat what I had previously said, and that I would be obliged to inform the Court in the plumbing case of the motive explained to me for the Humble objections to our counsel fees. Mr. Simon assured me he would also reveal to the Court his reason for the objections.

/s/ Harold E. Kohn

HAROLD E. KOHN

Sworn to and subscribed
before me this 24th day
of March, 1972.

/s/ Lillian T. Williams

Notary Public
Philadelphia, Philadelphia Co.
My Commission Expires August 11, 1975

UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

CITY OF DETROIT, et al. 66 CIV. 4026

v.

GRINNELL CORPORATION, et al. (E.D. Pa. Civ. 68-1478)

MANHATTAN-WARD, INC., et al. 68 CIV. 4028

v.

GRINNELL CORPORATION, et al. (E.D. Pa. Civ. 68-1489)

1225 VINE STREET BUILDING, INC., et al. 68 CIV. 4027

v.

GRINNELL CORPORATION, et al. (E.D. Pa. Civ. 68-1479)

AFFIDAVIT IN OPPOSITION TO APPLICATION BY PARKER, CHAPIN & FLATTAU, ET AL., FOR ATTORNEYS FEES

DAVID BERGER, ESQUIRE, being duly sworn according to law, deposes and says that he is counsel for class representative plaintiffs in the three above-captioned litigation and that he makes this affidavit in response to affidavits filed by Messrs. Stein, Victor and Robinson in support of their application for a share of the attorneys' fee to be awarded by this court from the settlement fund created by Petitioner in these three national class actions.

1. Upon Petitioner's cases being transferred to the Southern District of New York, Petitioner promptly requested that he be placed on the Steering Committee of Counsel for Subscriber Plaintiffs. This request was embodied in a letter dated November 5, 1968, from me to a member of the Troika (Appendix "A-1" hereto). This was acknowledged by the Troika. (Letter of November 22, 1968, attached hereto as Appendix "A-2").

2. With respect to the preparation of the Rule 34 motion for production of documents, the record is clear that petitioner's firm assumed the responsibility for and did prepare the motion for all plaintiffs. See memorandum from H.B. Newberg, Esquire (in Petitioner's firm at that time) dated April 17, 1969: "I have agreed to prepare the Rule 34 motion for circulation to the other counsel." (Memo attached as Appendix "B-1"). That Petitioner's office prepared the motion is evidenced by Mr. Newberg's letter of June 2, 1969, attached hereto as Appendix "B-2".

3. (a) With respect to the opposition to defendants' motion for partial summary judgment, petitioner shared responsibility in preparing the brief and took a major role in such preparation. Annexed hereto as Appendix "C-1" is Petitioner's original draft of the brief circulated among all plaintiff's counsel. A copy of the cover letter forwarding the draft to Mr. Victor is annexed as Appendix "C-2". This draft, in turn,

was circulated among other counsel. (See Mr. Victor's letter of June 21, 1969, annexed as Appendix "C-3"). Petitioner's firm participated with other plaintiffs' counsel in the final draft of the brief. Indeed, Petitioner insisted and persisted, over the objection of other counsel including members of the Troika, that an argument be included that Sections 5(a) and 5(b) of the Clayton Act must be applied independently of each other. Indeed, this legal point was the touchstone upon which this court and later the Court of Appeals rested its favorable decision.

(b) The initial draft of the brief in the Court of Appeals was prepared by agreement by Mr. Hoffman, counsel for a competitor plaintiff. Initially, Petitioner informed a member of the Troika that Petitioner's firm wished "to assist with the preparation of the plaintiffs' brief in the pending appeal." (See letter of January 8, 1970, annexed hereto as Appendix "C-4"). Upon receipt of Mr. Hoffman's draft, Petitioner's firm prepared and sent a five-page letter commenting on the draft, again insisting that the argument of the independent application of Sections 5(a) and 5(b) of the Clayton Act be advanced. A copy of Petitioner's letter is annexed hereto as "Appendix "C-5"). Thereafter, Petitioner's firm collaborated with other plaintiffs' counsel in preparing the final version of appellee's brief.

(c) With respect to the argument in the Court of Appeals, the affidavits of Messrs. Stein, Victor and Robinson are simply false with respect to their averment that the Troika "had no advance knowledge that Mr. Berger intended to participate..." (Robinson Affidavit, ¶7, pg.7). By letter to the Clerk, U.S. Court of Appeals (2nd Cir.), dated March 6, 1972, with a copy to a member of the Troika, Petitioner informed the Clerk of the Court of Appeals that Petitioner requested permission to make "argument on behalf of my clients in connection with the above captioned appeal, argument being scheduled for March 26, 1970." (Letter annexed as Appendix "C-6"). Moreover, a member of the Troika advised all other Subscriber Plaintiffs Counsel that "...David Berger... has requested permission from the court to argue the case on behalf of his own clients." (See Victor letter of March 12, 1970, annexed hereto as Appendix "C-7"). Accordingly, all plaintiffs' counsel had at least two weeks advance notice that Petitioner would personally protect the interests of his clients and the absent members of the classes by arguing before the Court of Appeals.

(d) Upon receipt of defendants' Petition for Certiorari filed in the United States Supreme Court, Petitioner's firm prepared a 9 page letter outlining the form of Answer to the Petition which Petitioner suggested. The outline was very detailed and was the product of extensive research by Petitioner. A copy of this letter, dated August 14, 1970, is annexed as Appendix "C-8". That Petitioner was a part of a small group of Counsel which prepared the final Answer is evidenced by Mr. Brett's letter of August 19, 1970 (Appendix "C-9") and Mr. Victor's letter of August 25, 1970 (Appendix "C-10") with a hand written note indicating that Mr. Montague of Petitioner's firm telephoned changes to Mr. Victor on August 28, 1970. Moreover, Mr. Montague attended a drafting session of the Answer held in New York City.

4. Petitioner has never had any agreement nor any understanding with the Troika about sharing of attorney's fees which may be awarded as a result of any recovery in the three national class actions commenced and prosecuted by Petitioner. Nor was Petitioner ever asked to enter into such an agreement. Petitioner did agree to reimburse the Troika on a pro rata basis for any out-of-pocket expenses incurred by the Troika in performing its "liaison" counsel duties. Indeed, Petitioner has done this.

5. With respect to the Troika's averment that it has acted as lead counsel, Petitioner has never recognized the Troika as acting as lead counsel with respect to Petitioner's cases. Petitioner in every aspect of this litigation has undertaken to perform all work necessary for the successful prosecution of these national class actions. Indeed, when Petitioner received a letter dated November 10, 1970 from Mr. Brett advising Petitioner that a "meeting of lead counsel was held last week" of which meeting Petitioner was not notified, Petitioner responded in a letter dated November 16, 1970 (Appendix "D" annexed hereto):

> "I was greatly disturbed and annoyed to learn from your letter of November 10, 1970 that a meeting of "lead counsel" had been held concerning the future progress of these actions and that our office was not apprised of such meeting. As you know,

> we have participated in every phase of this litigation, have attended and contributed to all similar past meetings, and have contributed heavily to the matters completed to date. Without regard to any nomenclature as to "lead counsel", we have always taken an active role in all antitrust litigation in which we participate, especially where our clients, as here, are representative of national classes. I was surprised at your omission to notify us and hope that it was inadvertent. With respect to future meetings, I anticipate that we will be notified."

5. Wherever cooperation among plaintiffs' counsel was called for, Petitioner cooperated. However, at all times Petitioner undertook to prepare and prosecute these class actions on his own. As admitted by the Troika, Petitioner alone prepared, briefed, argued the class action issues. Moreover, Petitioner alone negotiated with defendants the proposed $10,000,000 settlement now before this Court. Petitioner also alone has administered the administration of these class actions and the settlement process. The Troika took no part whatsoever in these significant and important aspects of the class action litigation -- and contributed nothing thereto. The settlement now before this Court as well as the more than 14,000 claims filed herein are all the result of Petitioners foresight and imagination in filing and successfully prosecuting these three national class actions.

6. Indeed, during the prosecution of these actions, certain members of the Troika expressed to Petitioner their hostility toward the class actions and made fun of the enormous undertaking which Petitioner had assumed in attempting to uphold and prosecute these actions as class actions. Indeed in a letter

dated September 17, 1971 to all counsel for subscriber-plaintiffs,*/ a member of the Troika candidly characterized the class actions as a "considerable stumbling block":

> "...It would appear certain that the class action settlements remove a considerable stumbling block to the possibility of disposition of our own respective cases upon satisfactory terms. ..." [Emphasis added].

More revealing of the hostility of the independent subscriber plaintiffs to the class actions is expressed in a letter from Haverstock, Gray Plant, Mooty and Anderson, Esq. (by Edward J. Callahan, Jr.) to Mr. Brett dated November 19, 1970*/ in which counsel for a litigating subscriber plaintiff states:

> "Meanwhile, at least for the majority of plaintiffs, a determination of the class action question would be very helpful. Bob Donnelly told me a week or so ago that after the defendants original letter on the subject to the judge, nothing whatsoever has been done. I'm not sure what other plaintiffs can do to speed this part up. but from the point of our clients, a ruling in favor of the defendants on the question raised there would help clear matters up." [Emphasis added]

Moreover, with respect to Petitioner's initial motion to have these cases declared valid class actions, a member of the Troika (Mr. Brett) responded to the Court as follows:

"Mr. Brett: Yes, your Honor. Those are a very limited application in terms of concern among the subscriber plaintiffs, and there are in court today Mr. Montague and Mr. Joseph, who are the counsel involved in the class action cases, if your Honor please, Mr. Montague is right here." (Hearing of June 17, 1969, Transcript at p.47).

---

*/Because this letter reveals possible strategy among remaining plaintiffs' counsel, Petitioner, as a matter of courtesy, is not affixing the letter to this Affidavit.

David Berger

Sworn to and Subscribed
before me this 23rd day
of May, 1972.

Notary Public

ALBERTA C. C. [illegible]
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires April 22, 1976

November 5, 1968

Ira M. Millstein, Esq.
Weil Gotshal & Manges
767 Fifth Avenue
New York, N. Y. 10022

Re: Central Station Protection Service Antitrust Litigation (Burglar Alarms, Etc.)

Dear Ira:

This will acknowledge receipt of your letter of October 28 sending a report of the meeting of plaintiffs' counsel held in your offices on October 24 in connection with the above-noted matter.

Because of important prior commitments, I was unable to join you and the group of plaintiffs' attorneys at this meeting. I do wish, however, to request that my name be added to the Steering Committee for the Subscribers, since our office is apparently the only one representative of governmental bodies generally in this litigation. As you may know, there were instituted here in the Eastern District of Pennsylvania, class actions in behalf of governmental bodies similarly situated.

I should also like to have my name added to the Subcommittee on Discovery. Since the actions which we commenced have only been recently filed, we have not yet been able to conduct discovery because of the various court stay orders pending the ruling of the Judicial Panel.

The matters in your recent letter of October 28 will be further reviewed by our office and we will forward any suggestions we may have to you at an early date. Because of the class action nature of the proceedings which we initiated in the Eastern District of Pennsylvania, it will be necessary at an early stage of the proceedings in New York to resolve these class action issues.

With all best wishes.

Sincerely,

David Berger

DB:ir

WEIL, GOTSHAL & MANGES

767 FIFTH AVENUE · NEW YORK, N.Y. 10022

PLAZA 8-7800 CABLE ADDRESS "WEGOMA"

ACE S. MANGES
ERT AKELOW
HIEL KASLOW
N H WIS
SE OLFF
HU KRCIDMANN
AHC WALLACE

ROBERT TODD LANG
IRA M. MILLSTEIN
MARTIN D. GINSBURG
PHILIP T. KAPLAN
MICHAEL R. STANTON
ARTHUR P. JACOBS

SHA C. BERGER
LIA IS LUBIC
HU ABELMAN
IA OPER
ON J. MEADOW
PHEN E. JACOBS
ALD S. RACKMAN
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MA CULLINAN
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L. VOLPA
L A. SCHWARTZ, JR.
L D. LOVELL
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AUL TOR
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STUART M. ROSEN
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STEPHEN H. COOPER
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PETER D. STANDISH
ROBERT E. SCHUR
DAVID P. GRIFF
ARTHUR J. LEVY
MARTIN D. AMOUR
JEROME OSTROV
ROBERT L. KATZMAN

SYLVAN GOTSHAL (1931-1968)
FRANK L. WEIL (1931-1957)

EUROPEAN OFFICE
44, AVENUE DES CHAMPS-ELYSEES
PARIS 8e FRANCE
256-23-30
STANLEY COHEN
RESIDENT PARTNER

November 22, 1968

David Berger, Esq.
Cohen, Shapiro, Berger,
  Polisher and Cohen
Twenty-Second Floor
Philadelphia Saving Fund Bldg.
Philadelphia, Pa. 19107

Re: Central Station Protection Service
Antitrust Litigation (Burglar Alarms, Etc.)

Dear David:

This is in response to your letter concerning your service upon the Steering Committee and Discovery Subcommittee in the above captioned matter, referred to in my letter of October 28 to all counsel for plaintiffs. I am pleased to add your name to our ranks, the more who want to work the better. I am sure those members of the Discovery Subcommittee with whom you will be serving will be delighted to have your services.

For your information please note that the Discovery Subcommittee has presently scheduled a meeting for Tuesday, November 26, at the office of Herbert Robinson, Esq., Liebman, Eulau, Robinson & Perlman, 32 East 57th Street, New York. I believe the meeting is to start at 10:00 A.M., but would appreciate your calling A. Paul Victor of my office to confirm that fact.

I look forward to seeing you. Best regards.

449 Sincerely,

IMM/ami
cc: Members of Steering Committee

MEMORANDUM

TO: David Berger
FROM: Herbert B. Newberg HBN
RE: Burglar Alarms

April 17, 1969

I attended a meeting of all plaintiffs' counsel in New York yesterday, April 16, 1969.

It was decided that a standard set of interrogatories would be filed and that a simple Rule 34 Motion would be filed for everyone, to request particular competitive reports and contract data for all plaintiffs, nationwide.

A follow up meeting of all plaintiffs' counsel has been set for May 14th in New York at 2:00 o'clock pm.

I have agreed to prepare the Rule 34 motion for circulation to the other counsel.

You will recall in this action that the United States Supreme court affirmed a conviction of antitrust violations against the defendants in the burglar alarms case.

Accordingly it was decided that since we have the benefit of a governmental trial, discovery should be kept to a simple level and an early trial date should be sought. The Federal Government has a civil action now pending in New York which has been consolidated for pre-purposes with other triple-damage actions. The Federal Government was represented at our New York meeting and he agrees that ours is good strategy.

The Federal Government currently has pending a motion for summary judgment on the basis of collateral estoppel which it plans to move forward as soon as possible.

I mentioned to those in attendance at the meeting that Philadelphia has national class actions both public and private which Philadelphia intends to press in the near future for court decision.

June 2, 1969

Herbert Robinson, Esquire
Liebman, Eulau, Robinson & Perlman
32 East 57th Street
New York, New York 10022

Re: Grinnell Cases

Dear Herb:

Enclosed please find a revised draft of Plaintiffs' Consolidated Motion for Order of Production of Documents in the Grinnell cases.

I do not have knowledge of all of the captions or of all of the names of the plaintiffs' attorneys in whose behalf this Rule 34 Motion will be filed. I presume that since the same information will be included on the consolidated interrogatories, that the discovery sub-committee does have this information among its members. Accordingly, if you would arrange to have mailed to me the information concerning the relevant captions and list of attorneys with their telephone numbers, I shall be happy to prepare the motion in final form. Of course, any further comments by the discovery sub-committee will be reflected in the final form. In the alternative, as time is an important factor then perhaps the final form of the Rule 34 Motion should be typed in New York City and filed and distributed from there.

There is a possibility that I personally will not be able to attend the meeting among plaintiffs' counsel scheduled for Thursday, June 5 at 10:00 a.m. In that event I will have someone else in our office attend the meeting.

Hebbert Robinson, Esquire June 2, 1969

Please telephone me immediately upon receipt of this letter and advise whether you wish us to provide sufficient copies of the Revised Rule 34 Motion for all plaintiffs expected to attend the meeting on Thursday. By copy of this letter to all members of the discovery sub-committee I am requesting any comments they may have regarding the Rule 34 Motion.

Sincerely,

David Berger
Herbert B. Newberg

HBN/mc

Encl.

LAW OFFICES
COHEN, SHAPIRO, BERGER, POLISHER & COHEN
PHILADELPHIA SAVING FUND BUILDING
PHILADELPHIA, PA. 19107

C-1

D R A F T

RE BURGLAR ALARMS TREBLE DAMAGE ANTITRUST LITIGATION -- ARGUMENT CONTRA DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT (STATUTE OF LIMITATIONS).

THE GOVERNMENT CIVIL CASE CONTINUED TO PEND, FOR PURPOSES OF §5(b), CLAYTON ACT, AT LEAST UNTIL THE DISTRICT COURT'S FINAL DECREE OF JULY 11, 1967 WAS ENTERED.

Defendants' position that the Government civil suit against the defendants ceased to pend when the United States Supreme Court handed down its Opinion of June 13, 1966 or issued its Mandate of July 11, 1966 is contrary to the letter, spirit and case law construction of Section 5(b) of the Clayton Act (amended, 1955) (15 U.S.C. §16(b)). That section provides:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

EXHIBIT C-1

The section is clear in its intent in that it talks only in terms of the "pendency" of "any civil or criminal proceeding ... instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws. ..." Defendants, in what appears to be desperation, suggest a strained and unreasonable construction of Section 5 which would dichotomize the pendency of a government civil action into what defendants' self-servingly call (1) "the enforcement" portion of the action and (2) the "remedy" or "relief" portion thereof. Applying their spurious theory to the case sub judice, defendants suggest that the government's civil action against defendants Grinnell Corporation, et al. "to prevent, restrain or punish violations" of the Sherman Act ceased to pend upon the Supreme Court's decision of June 13, 1966 and its mandate pursuant thereto which affirmed the judgment of the District Court and reversed the decree, remanding the same to the District Court for further hearing on the nature of the relief consistent with the views expressed in the Opinion of the Court [U. S. v. Grinnell Corporation, 384 U.S. 563, 16 L. ed. 2d 778 (1966)]. Defendants advance this theory despite the established principle that "The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial." United States v. DuPont De Nemours & Co., 366 U.S. 316, 323, 6 L. ed. 2d 318, 323 (1961). Defendants also appear to overlook the Supreme Court's direction to the District Court in U. S. v. Grinnell Corp., supra, that the relief granted should specifically relate to the violations practiced.

> "The Government objects, as do the defendants, to the broad and generalized terms of the restraining order. They properly point out, as we emphasized in Schine Theatres v. United States, supra, 334 U.S. at 125-126, 92 L. ed. at 1256-1257, that the precise practices found to have violated the Act should be specifically enjoined. On remand, we suggest that that course be taken." United States v. Grinnell Corporation, supra 384 U.S. at 579-580, 16 L. ed. 2d at 791 (1966). [Emphasis supplied].

Beginning with the Supreme Court's decision in New Jersey Wood Finishing Company v. Minnesota Mining and Manufacturing Company, 381 U.S. 311, 14 L. ed. 2d 405 (1965), Section 5(b) has been given renewed vitality and significance in the scheme of effective antitrust enforcement. In the 3M case, the Court emphasized that "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." 381 U.S. at 318, 14 L. ed. 2d at 411. With this Congressional intent in mind, the Court ruled that a proceeding before the Federal Trade Commission is a "civil or criminal proceeding ... instituted by the United States" which suspends the statute of limitations during its pendency. Thus, the Court gave a liberal rather than a restrictive construction to the phrase "civil or criminal proceeding ... instituted by the United States."

Following the 3M case, the Court in Leh v. General Petroleum Corporation, 382 U.S. 54, 15 L. ed. 2d 134, Reh. den. 382 U.S. 1001, 15 L. ed. 2d 491 (1965), gave a liberal rather than restrictive construction to the phrase "based in whole or in part on any matter complained of." In determining the effect to be given to Section 5(b), the Court held:

> "Rather, effect must be given to the broad terms of the statute itself -- 'based in whole or in part on any matter complained of' (emphasis added) -- read in light of congress' 'belief that private antitrust litigation is one of the surest weapons for effective law enforcement of the anti-trust laws.; 381 U.S. at 318, 14 L. ed. 2d at 411.

> Doubtlessly, care must be exercised to insure that reliance upon the government proceeding is not mere sham and that the matters complained of in the government suit bear a real relation to the private plaintiff's claim for relief. But the courts must not allow a legitimate concern that invocation of Section 5(b) be made in good faith to lead them to a niggardly construction of the statutory language here in question." 382 U.S. at 59, 15 L. ed. 2d at 138.

In accordance with the Supreme Court's pronouncements in the 3M and Leh cases, the Third Circuit, in State of New Jersey v. Morton Salt Co., 387 F. 2d 94 (3rd Cir. 1967), gave the following guidelines for the construction of Section 5(b) of the Clayton Act:

> "The Congressional history, as reflected in the Minnesota Mining case, gives further support to the view that the tolling provision was enacted for the benefit of private parties who were injured. This factor plus Congressional policy suggest most strongly that the tolling provision, if of doubtful meaning, should be interpreted in a way which will permit a determination on the merits of private claims in this area." New Jersey v. Morton Salt Co., supra, 387 F. 2d at 97. [Emphasis supplied].

Dispite the plain language of Section 5(b) and the congressional intent behind it and the judicial interpretation and construction of it as expressed in 3M, Leh and Morton

Salt Co. cases, defendants rely on two 1956 cases to place a restrictive construction upon the word "pendency," i.e. Grenge v. Twentieth Century Fox Film Corporation, 232 F. 2d 325 (7th Cir. 1956); and Tague v. Balaban, 146 F. Supp. 356 (N.D. Ill. 1956). Both of these cases grew out of the Government civil proceedings involving the movie industry, U. S. v. Paramount Pictures, Inc., 334 U.S. 131, 92 L. ed. 1260 (1948). Both the Grenge and the Tague cases dealt with Section 5 of the Clayton Act prior to its 1955 Amendment and rested upon the premise (now erroneous) that the prima facie evidence provision of Section 5 was inexorably intertwined with the tolling provision. Thus in Tague, the court held that the government civil proceeding ceased to pend, and the statute of limitations ceased to be suspended, when a February 8, 1950 decree in the Government proceeding was entered and rehearing thereon was denied by the Supreme Court, because at that time, there was a decree which could be used as prima facie evidence in the private suit. The reasoning of the court in Tague was as follows:

> "Therefore, a Government suit ceases to pend, for purposes of Section 5, once there has been a final adjudication of some violation of the anti-trust laws

> which can be evidence to support allegations of the same alleged violations in a suit by a private plaintiff. This is especially so since it is the adjudication of a violation, and not the type and extent of relief granted, that is evidentiary value to a private plaintiff in a subsequent suit." Tague v. Balaban, supra, 146 F. Supp. at 360. [Emphasis added].

In Tague, as well as in Grengé, the court relies upon a construction of Section 5 which makes the statute of limitations tolling provision dependent upon the prima facie evidence provision. However, both the 3M and Leh cases, supra, have overturned this construction and held that Sections 5(a) and 5(b) are not interrelated, but apply independently of each other. In the 3M case, supra, the Court held:

> "In our view, therefore, the two sections are not necessarily coextensive; they are governed by different considerations as well as congressional policy objectives. This makes §5(b) readily severable from §5(a), is inapplicable to Commission proceedings ... that conclusion would be immaterial in our consideration of §5(b) and §4(b)." 381 U.S. at 318, 14 L. ed. 2d at 410-411. [Emphasis supplied].

EVEN IF WE assume arguendo that §5(a)

The Court in 3M continued:

> "... In this connection, and of crucial significance, is the fact that the potential advantages available to

> such litigants because of §5(b) reach far beyond the specific and limited benefits accruing to them under §5(a)." 381 U.S. at 320, 14 L. ed. at 412.

Accordingly, the Tague and Grenge cases are no longer of any significance in that the rationale behind their conclusions has become obsolete.

Dickinson, Inc. v. Kansas City Star Company, 173 F. Supp. 423 (W.D. Mo. 1959), a decision prior to the 3M and Leh cases, espouses defendants' position as untenable. In Dickinson, the government simultaneously commenced a criminal and a civil action against defendants for violations of Section 2 of the Sherman Act. The criminal action resulted in "guilty" verdicts. The civil action ceased to pend when defendants entered into consent decrees five months after the criminal suit terminated. The court ruled that the government suit continued to pend AND suspend the running of the statute of limitations until the time the consent decrees in the civil actions were entered. It further ruled that the criminal suit could be used as prima facie evidence by the private plaintiff, even though the plaintiff commenced his action more than one year after the criminal suit ceased to pend.

The *Dickinson* case was approved in *State of Michigan v. Morton Salt Company*, 259 F. Supp. 35 (D. Minn. 1966) affirmed sub nom. *Hardy Salt Co. v. State of Illinois*, 377 F. 2d 768 (8th Cir. 1967), which held that the pendency of a government civil suit suspended the statute of limitations irrespective of the fact that the civil suit was decided solely upon the record of a previous companion criminal suit against the same defendants. In so holding, the court stated:

> "Because the Government civil action here produced no new testimony, being submitted on the record made in the criminal case, defendants maintain that the fruits of the Government action were available to plaintiffs following completion of the criminal case. It is suggested that they could well have initiated their review and assessment of the Government case and their respective claims during the year following termination of the criminal action. *This argument suffers from hindsight* to the extent that private plaintiffs may not have been aware that the civil action would produce little else in the way of discovery, documents, testimony or exhibits. Additionally, questions may have been raised in the civil suit which had not been previously determined gy the criminal action.. If this were so, then the private actions could conceivably progress at a faster pace." 259 F. Supp. at 52. [Emphasis supplied].

In light of the foregoing, defendants' argument that the Supreme Court decision of June 13, 1966, U.S. v. Grinnell Corp., supra, ended the pendency of the government proceeding, despite the fact that the case was remanded and further evidence was presented to the district court at trial, must be rejected. Rather, July 11, 1967, the date on which the final decree was entered by the District Court, must be considered the date upon which the Government proceeding ceased to pend.

Even assuming arguendo that a decree which may be used as prima facie evidence under §5(a) is automatically a decree which ceases the pendency of the action under §5(b), the facts of the present case dictate the conclusion that the government case against the defendants continued to pend at least until the district court's decree of July 11, 1967 was entered. It is clear, as the defendants recognize, that the July 11, 1967 decree may constitute prima facie evidence.

The Supreme Court, in its opinion, directed that "the precise practices found to have violated the Act should be specifically enjoined. On remand we suggest that that course be followed." U.S. v. Grinnell Corp., supra, 384 U.S.

at 579-580, 16 L. ed. 2d at 791. Furthermore, in discussing the means of the §2 violations, the Court stated:

> "Two of the means by which ADT acquired and maintained its large share of the market are the requirements that subscribers sign five-year contracts and the retention by ADT of title to the protective services equipment installed on a subscriber's premises. On this record it appears that these practices constitute substantial barriers to competition and the the relief against them is appropriate. The pros and cons are argued with considerable vehemence here. Again, we cannot resolve them on the record. The various aspects of this controversy must be explored by the District Court and suitable protective provisions included in the decree. ..." 384 U.S. at 578, 16 L. ed 2d at 790, 791 [Emphasis supplied].

Accordingly, the Supreme Court recognized that further adjudication was necessary with respect to two very important aspects of the monoply. It recognized that the effect of these practices could not be determined on the present record. Further exploration into this "controversy" was done by the district court in the form of depositions, documentary evidence, two days of trial hearings and final argument, all of which resulted in the final decree of July 11, 1967.

That defendants recognize that the Supreme Court decision, order and mandate did not cause the government proceeding to cease pending is clear from their briefs and letters submitted to the district court in the government proceeding and to this Court in the present case. In a letter to Judge Wyzanski dated May 25, 1967, counsel for defendant ADT, obviously with an eye toward avoiding any prima facie effect of the decree in private treble damage actions, stated:

> "Nothwithstanding these and other considerations, if the Government will agree to certain consent language previously proposed by the defendants or if the Court were to adopt language indicating that the Final Judgment to be entered is by consent of the defendants without additional findings of fact or conclusions of law, ADT would agree to accept without objection what we understand to be the substance of your proposed language."

Likewise, Defendant Grinnell, in its Memorandum On Remand, requested the Court to include in the final decree language which would indicate that the decree was a consent decree as to Grinnell so that the decree could not be used as prima facie evidence in private treble damage actions against Grinnell. Counsel for Grinnell recognized:

> "In the instant case, however, the Supreme Court's majority opinion states that 'the precise practices found to have violated the Act should be specifically enjoined" (384 U.S. at pp. 579-80). This language may be used.

> hereafter to support an argument that anything now enjoined is a 'precise practice' which this Court 'found to have violated' the Sherman Act, and that the final decree creates a prima facie case to that effect."

From the decree of July 11, 1967, it is obvious that Judge Wyzanski disagreed with defendants' position.

Perhaps more revealing are the statements of defendants in their briefs in these cases in support of their motions to strike from the complaints references to the government proceedings in U. S. v. Grinnell Corporation, 236 F. Supp. 244 (D. R. I. 1964), aff'd in part and rev'd in part, 384 U.S. 563 (1966):

> " ... Here plaintiffs attempt to rely upon a 1964 District Court judgment which was not wholly affirmed and which was superseded by a final decree not entered until July, 1967." Brief of ADT at p. 4.
>
> "Under the provisions of §5(a), it is only the final decree itself which may be used as prima facie evidence, and then only with respect to those issues which were actually and necessarily decided by the judgment and which establish matters of ultimate fact in the private suit. The various opinions, decisions or changes which led up to entry of the final judgment are not themselves evidence, and are not properly part of the complaint." Memorandum of Grinnell Corporation, at p. 5.

Grinnell took the position that plaintiffs "may refer to the final decree therein and state that they intend to use it as prima facie evidence in these proceedings to the extent permitted by Section 5(a). ..." (Memorandum of Grinnell Corporation, at p. 4).

Aside from the defendants' own recognition, it is clear that the final decree of July 11, 1967 may be used as prima facie evidence in these private treble damage suits. In Hanover Shoe, Inc. v. United Shoe Machinery Corporation, 245 F. Supp. 258 (M.D. Pa. 1965), aff'd. 392 U.S. 481, 20 L. ed. 2d 1231, Reh. den. 393 U.S. 901, the Court held that a decree setting forth the relief granted was properly admissible under §5(a) of the Clayton Act as prima facie evidence in a private action:

> "If the lease-only system was not a monopolistic practice by the aid of which United Maintained is monopolistic position, it would have been unnecessary for the court to order its cessation since it is a practice which could exist independent of the other lease provisions and practices." 245 F. Supp. at 268.

Likewise, in Elyria-Lorain Broadcasting Co. v. Lorain Journal Company, 298 F. 2d 356 (6th Cir. 1961), an injunctive decree in a government antitrust proceeding was permitted to be introduced as prima facie evidence under Section 5(a), Clayton Act:

> "...[W]here an injunction is granted there must have been a determination of present damage." 298 F. 2d at 358.

In Fifth and Walnut, Inc. v. Loew's Incorporated, 176 F. 2d 587, 593 (2nd Cir. 1949) (another of the "movie cases"), the Court held that a Supreme Court decree was not final and could not be introduced as prima facie evidence under old §5, Clayton Act, where the "Supreme Court has accepted the basic findings of illegality and has sent the cases back for more complete relief; in short that the error found was of the nature to make a final result more favorable that otherwise to the plaintiffs' position."

Defendants rely on Grenge v. Twentieth Century Fox Film Corporation, 232 F. 2d 325 (7th Cir. 1956). In addition to the reasons previously set forth herein, those cases are Not applicable to the present cases on their facts. In the Tague case, the district court held that the 1950 decree against defendant Loew's was a final decree, even though it directed the parties to submit plans for divorcement and divestiture of Loew's exhibitor holdings in order to comply with the Supreme Court's 1948 decision. The decree relied upon by the plaintiff in Tague, was a 1952 decree against Loew which was handed down pursuant to the 1950 decree and the greater part of which was the parties' plan for divorcement and divestiture. 146 F. Supp. at 359-360.

In the cases at bar, a reading of the district court's July 11th 1967 decree in the related Government proceeding clearly shows that the decree dealt with much more than the parties' plan of divestiture. The Court set forth in the decree itself that the decree was only issued after the Court had "fully considered" the earlier record of the case, including the evidence, and "all aspects of the decree as to which the Supreme Court directed further inquiry on remand and as to which the parties had reached no agreement.

In the Grenge case, the Court held that the government proceeding continued to pend up to the time the court entered a remand decree which "for the first time determined that the vertical integrations were active aids to the conspiracy theretofore determined and were therefore violations of the act." 232 F. 2d at 333. Again, the "relief" aspect of the decree which the Court, by dicta, indicated would not continue to pend the action, was the same as that portion of the decree involved in the Tague case.

If anything, the facts of the Grenge case support the conclusion in this case that the government proceeding here continued to pend until the decree on remand was entered on July 11, 1967. For as in Grenge, the district court, after remand, for the first time determined if and to what extent the defendants' practices of requiring subscribers to sign five-year contracts and the retention by ADT of title to the protective services equipment installed on the subscriber's premises constituted substantial barriers to competition.

This Court's Pre-trial Order and conclusion in Gottesman v. General Motors Corporation, Civil Action No. Civ. 121-251 (S.D.N.Y.), (Pretrial Order filed March 18, 1963) also supports plaintiffs' position that the Government's proceedings here pended until July 11, 1967, the date of the decree on remand. In Gottesman, The district Court entered a Judgment on December 9, 1954 dismissing the Government's claims of violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. On June 3, 1957, the Supreme Court sustained the Government on the Section 7 violation and expressly did not rule upon Sections 1 and 2 of the Sherman Act. The Supreme Court issued a mandate on June 16, 1957 stating that the judgment was reversed and the cause remanded for further hearing on the question of appropriate relief.

Upon remand, the District Court entered two separate judgments on November 17, 1959, one judgment vacating its original judgment only as it dealt with Section 7 of the Clayton Act, decreeing that defendants had violated Section 7 and providing the appropriate relief. The second judgment of November 1957 stated that previous decree dismissing the Sherman Act Sections 1 and 2 claims remained untouched. From the judgment dealing with Section 7, the defendants appealed. On May 22, 1961, the Supreme Court vacated that judgment and remanded the case for further proceedings consistent with its opinion as to the relief to be granted. On March 22, 1962, the District Court, on remand, entered the final judgment. In the ensuing private antitrust action that followed, the Court held that the Government suit continued to pend until March 1, 1962, the date when the district court, upon remand, entered the final judgment. Thus, although after the Supreme Court's second remand of the government proceeding all that was left for the district court to conduct was further proceedings consistent with the Supreme Court's opinion as to the relief to be granted, it was held that the action continued to pend after the Supreme Court's determination, and until the district court entered its final decree.

Conspicuously absent from the Court's Pre-Trial Order of March 18, 1963 in Gottesman is any distinction between an adjudication of a violation and the granting of relief. Defendant's assertion that the only reason the government action continued to pend up to the March 1, 1962 remand order is because until that time there was no"'piece of paper called a final judgment as to which the appellate process had been exhausted'" tends to make a mockery of the Court's Pre-trial Order in Gottesman. Defendants base this assertion on the fact that the Supreme Court on the second appeal "vacated" the judgment. However, it is clear from a reading of the Supreme Court's opinion in United States v. DuPont DeNemours & Co.*, 366 U.S. 316, 6 L. ed. 2d 318(1961), that the Supreme Court made a final adjudication that there was a violation of §7 of the Clayton Act, and that the district court had to determine only the equitable relief necessary. In fact, the only question before the Supreme Court on the second appeal was the "adequacy of relief allowed by the District Court." 366 U.S. at 326, 6 L. ed. 2d at 325. And upon the second remand, the only duty of the district court was to fashion a decree for complete divestiture by the defendant of its stock in General Motors. In this light, defendants' clinging to the to the Supreme Court's word "vacated" demonstrates the inherent weakness of defendants' contention.

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* The government proceeding relevant to the Gottesman case.

In light of the foregoing, it is clear that Government civil proceeding entitled United States v. Grinnell Corporation, et al. continued to pend, within the meaning of §5(b) of the Clayton Act, until the decree on remand was entered by the District Court on July 11, 1967, and accordingly, that the statute of limitations for private treble damage actions based in whole or in part on the Government proceeding was suspended for one year thereafter, at least until July 11, 1968.

C-2

July 18, 1969

A. Paul Victor, Esquire
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10022

Re: Grinnell Cases -- Brief Contra Defendants' Motion for Partial Summary Judgment (Statute of Limitations)

Dear Paul:

Enclosed please find six copies of a draft of our portion of the brief concerning July 11, 1967 as the date when the government action in the above cases ceased to pend. Although the argument is set forth under one argument heading, as a matter of style you may want to break down this portion of the argument into two or three separate argument headings. You will also note that we did not go into detail with reference to the "movie" cases in that we felt that they can be distinguished on their merits.

If you have any questions whatsoever, please contact us. We will see you next week concerning the final draft of the brief.

Sincerely yours,

Herbert B. Newberg
H. Laddie Montague, Jr.

HBN:HLM,Jr./th

Enclosures

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EXHIBIT C-2

G.L.
C-3

WEIL MANGES

207 FIFTH A. NEW YORK, N.Y. 10022
PLAZA 8-7800 CABLE ADDRESS "WEGOMA"

HORACE R. MANGES
ROBERT ANELOW
GABRIEL PASLOW
JOHN H. LEWIS
JESSE D. WOLFF
ARTHUR M. BRICKMANN
EDWARD C. WALLACE
ROBERT TODD LANG

IRA M. MILLSTEIN
MARTIN D. GINSBURG
PHILIP T. KAPLAN
MICHAEL A. STANTON
ARTHUR P. JACOBS
IRVING SCHER
STEPHEN E. JACOBS

MARSHALL C. BERGER
ARTHUR F. ABELMAN
NATHAN COOPER
MYRON J. MEADOW
GERALD D. BACHMAN
THOMAS P. CULLINAN
DANIEL SUGRUE
LEO L. SCHMOLKA
CARL A. SCHWARZ, JR.
CARL D. LOBELL
DONALD J. WILLIAMSON
ELIHU FIER
A. PAUL VICTOR
STEPHEN F. SCHWARTZ
STUART M. ROSEN
SAMUEL H. LAITMAN

RONALD F. DAITZ
STEPHEN M. COOPER
LEONARD J. LEV
STUART D. AMES
BURTON SILVERSTEIN
PETER R. GILBERT
MARK A. VOGEL
PETER D. STANDISH
ROBERT E. SCHUR
DAVID M. GRIFF
MARTIN B. AMDUR
ROBERT L. PATZMAN
ERIC R. ROPER
LAWRENCE P. LITTELMAN
GEOFFREY P. WHARTON

SYLVAN GOTSHAL (1931-1968)
FRANK L. WEIL (1931-1957)

EUROPEAN OFFICE
44, AVENUE DES CHAMPS-ELYS
PARIS 8e FRANCE
256-23-30
STANLEY COHEN
RESIDENT PARTNER

July 21, 1969

Gentlemen:

Attached for your consideration is a copy of the draft statute of limitations brief which I received at 3:45 this afternoon from Herb Newberg and Laddie Montague.

Due to other commitments and time problems, the best time to have our drafting session with respect to this draft and Herb Robinson's affidavit will be at 2:00 P.M. on Wednesday, July 23, at this office. I think we should be prepared to work as long as necessary to get this brief into final shape, as I do not expect there will be sufficient time for us to work on it together subsequent to Wednesday.

Sincerely yours,

WEIL, GOTSHAL & MANGES

By Paul
A. Paul Victor

APV:jaw
Enclosure

cc: Herbert Robinson, Esq.
Max Wild, Esq.
Barry Brett, Esq.
Glen Kanwit, Esq.
Herbert B. Newberg, Esq.

474

EXHIBIT C-3

C-

January 8, 1970

A. Paul Victor, Esquire
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10022

Re: Burglar Alarm Antitrust Cases

Dear Paul:

This is merely to remind you that we would like to assist with the preparation of the plaintiffs' brief in the pending appeal in the above action.

Also, as I told you at the last meeting of plaintiffs' counsel, we are willing to supply man power for reviewing ADT's records for the preparation of the answer to interrogatory no. 19.

Looking forward to hearing from you concerning both of the above matters.

Sincerely yours,

COHEN, SHAPIRO, BERGER,
POLISHER and COHEN

H. Laddie Montague, Jr.

HLM,Jr./th

cc: Barry J. Brett, Esq.

EXHIBIT C-4

C-5

LAW OFFICES

Cohen, Shapiro, Berger, Polisher and Cohen

ABRAHAM L. SHAPIRO
SYLVAN M. COHEN
REUBEN L. COHEN
PERRY S. BECHTLE
SAMUEL M. LANDY
ROBERT FREEDMAN
BENNETT L. AARON
E. BURTON KERR
HERBERT B. NEWBERG
MAYOR SHANKEN
M. LADDIE MONTAGUE, JR.
PATRICK W. KITTREDGE
RONALD B. GLAZER
STEPHEN C. SUSSMAN
ALAN M. LERNER
HOWARD A. BLUM
MICHAEL J. KLINE

EDWARD N. POLISHER
DAVID BERGER
PHILIP M. SHICKMAN
ALBERT STEINBERG
IRVING I. SPECTER
NATHAN B. FEINSTEIN
SIDNEY MARGULIES
RICHARD B. PEARL
MARK K. KESSLER
HAROLD GREENBERG
RICHARD D. LADEN
HOWARD L. SCHAMBELAN
RICHARD M. SQUIRE
DENNIS E. KAPUSTIN
BARRY F. GREENBERG
HOWARD J. KAUFMAN

ALBERT M. COHEN
1920-1950

TWENTY-SECOND FLOOR
PHILADELPHIA SAVING FUND BUILDING
PHILADELPHIA, PA. 19107
(215) WA 2-1300

CABLE ADDRESS
COSAC

February 25, 1970

A. Paul Victor, Esquire
Weil, Gotshal and Manges
767 Fifth Avenue
New York, New York 10022

Re: Burglar Alarms Antitrust

Dear Paul:

The following are our comments concerning the draft of the brief for plaintiffs -- appellees involving the statute of limitations issue in these cases:

1. Pages 24 and 25 of the Draft Relating to the Quotations in Defendants' Brief from the Legislative History:

We fully agree that the defendants have misconstrued and misused the language contained in the legislative history, but we think the present brief, on page 25, misstates the congressional intent behind the 1955 amendment. Accordingly we suggest that the following language be inserted in lieu of the paragraph beginning on the bottom of page 24 and carrying over to page 25 of the draft brief:

In support of their "liability-remedy" distinction with respect to suspension of the statute of limitations, defendants quote selected language from the Senate Judiciary Committee Report which, defendants contend, illustrates that Congress, in amending §5(b), did not wish to unduly prolong the suspension of the statute of limitations. Defendants then argue that the "liability-remedy" distinction coincides with and furthers this congressional intent.

However, defendants seriously misconstrue the congressional intent by relying on language taken out of context. Set forth below is the full paragraph only partically quoted by defendants (that portion which was not quoted by defendants being underlined):

> "While the committee considers it highly desirable to toll the statute of limitations during a Government antitrust action and to grant plaintiff a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws. The present bill would assure all plaintiffs of at least 4 years from the time their cause of action accrued to which to institute suit. It would also guarantee every plaintiff at least a year from the close of a Government antitrust suit to prepare his case and file his complaint. But in cases where the plaintiff's action had been suspended by the pendency of a Government antitrust proceeding, he would be required to bring his action either (a) within the suspension period, i.e., within 1 year after the Government suit had terminated, or (b) within 4 years after his cause of action accrued." S. Rep. 619, in U.S. Code Cong. & Adminis. News. 84th Cong., 1st Sess. 2333 (1955).

Prior to the 1955 amendment, §5 provided that the applicable state statute of limitations was suspended by an intervening government proceeding and that the statute of limitations continued to run after the government proceeding ceased to pend. Gordon v. Loew's Incorporated, 247 F.2d 451, 458 (3rd Cir. 1957); Momand v. Universal Film Exchanges, 172 F.2d 37 (1st Cir. 1949), cert. den. 336 U.S. 967, reh. den. 337 U.S. 934, reh den. 337 U.S. 961. The above-quoted language was Congress' instruction that the pre-1955 suspension rule would not continue, but rather that a private plaintiff's statute of limitations would be four (4) years or, in the alternative, one (1) year after the government proceeding ceased to pend, but not four (4) years plus the pendency of the government proceeding.

2. *We Strongly Urge that the Following be Inserted, Probably at the End of the Argument ending on Page 23 of the Draft*:

The dicta in the *Grengs* and the *Tague* cases, relied upon by defendants, dealt with Section 5 of the Clayton Act prior to its 1955 Amendment and rested upon the premise (now erroneous) that the prima facie evidence provision of Section 5 was inexorably intertwined with the tolling provision. The reasoning behind the court's dicta in *Tague* was as follows:

> "Therefore, a Government suit ceases to pend, for purposes of Section 5, once there has been a final adjudication of some violation of the anti-trust laws *which can be* evidence to support allegations *of the* same alleged violations in a suit by a private plaintiff. This is especially so since *it is the adjudication* of a violation, and *not the type and extent* of relief granted, *that is evidentiary value* to a private plaintiff in a subsequent suit." *Tague v. Balaban*, supra, 146 F. Supp. at 360. [Emphasis added].

In *Tague*, as well as in *Grengs*, the court relied upon a construction of Section 5 which made the statute of limitations tolling provisions dependent upon the prima facie evidence provision. However, both the *3M* and *Leh* cases, supra, rejected this construction and held that Sections 5(a) and 5(b) are not coextensive, but apply independently of each other. In the *3M* case, supra, the Court held:

> "In our view, therefore, the two sections are not necessarily coexistensive; they are governed by different considerations as well as congressional policy objectives. This makes §5(b) readily serverable from §5(a). Even if we assumed arguendo that §5(a) is inapplicable to Commission proceedings ... that conclusion would be immaterial in our considerations of §5(b) and §4(b)." 381 U.S. at 318, 14 L. ed. 2d at 410-411. [Emphasis supplied].

The Court in 3M continued:

> "...In this connection, and of crucial significance, is the fact that the potential advantages available to such litigants because of §5(b) reach far beyond the specific and limited benefits accruing to them under §5(a)." [emphasis added] 381 U.S. at 320, 14 L. ed at 412.

Likewise, in the recent case Maricopa County v. American Pipe and Construction Co., 303 F. Supp. 77 (D. Ariz. 1969), the court recognized that "the 'complimentary' and togetherness construction given Clayton §§5(a) and 5(b) ... was discarded and overruled in Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co. ..." 303 F. Supp. at 84.

Accordingly, although a government proceeding would be considered to pend until at least a judgment capable of being used under §5(a) is rendered, §5(b) goes beyond §5(a) time-wise with its tolling provisions. As the 3M case makes clear, "...the textual distinctions as well as the policy basis of §5(b) indicate it was to serve a more comprehensive function [than §5(a)] in the congressional scheme of things." 381 U.S. at 319, 14 L. Ed. 2d at 411. For example, where the government brings both a criminal and a civil action for the same antitrust violations, and the criminal action is concluded with a judgment that is prima facie evidence under §5(a) while the civil action continues to pend, the statute of limitations continues to be tolled by that pending civil action. *Dickinson, Inc. v. Kansas City Star Company*, 173 F. Supp. 423 (W.D. Mo. 1959); accord, *Maricopa County v. American Pipe and Construction Company*, supra. See this brief, infra, pp. 29 and 30.

3. The foregoing are the two major revisions which we feel must be made in the brief. In addition we have the following minor suggestions.

a. The brief refers to the government case either as "government antitrust enforcement action" or "government enforcement proceeding". We feel that the word "enforcement" should be omitted in that it seems to give recognition to the defendants' "liability-remedy" theory.

b. On the top of page 6, phrase (4) should be revised to read as follows:

> (4) enumerating specific practices found to have violated the Sherman Act and enjoining those practices, some of which had not previously been enjoined,

c. On page 13, immediately following the phrase ending with footnote number 3, the following should be inserted:

> there was no final declaration as to the specific actions of the defendants that violated the antitrust laws;

As I mentioned to you over the phone, I am planning to attend the meeting of counsel to be held on March 3. Looking forward to seeing you then.

Sincerely yours,

COHEN, SHAPIRO, BERGER,
POLISHER and COHEN

H. Laddie Montague, Jr.

HLM,Jr./th
cc: Barry J. Brett, Esq.

c-6

March 6, 1970

Clerk, U. S. Court
of Appeals
for Second Circuit
United States Court House
Foley Square
New York, New York 10007

Re: *Russ Togs, Inc., et al. v. Grinnell Corporation, et al., Docket Nos. 33427, 34439, 34529 and 34541*

Dear Sir:

Please be advised that I represent the plaintiffs in the actions indicated below:

City of Detroit, et al. v. Grinnell Corporation, et al., (68 Civ. 4026 S.D.N.Y.)

1225 Vine Street Building, Inc., et al. v. Grinnell Corporation, et al., (68 Civ. 4027)

Manhattan-Ward, Inc. et al v. Grinnell Corporation, et al., (68 Civ. 4028)

Associated Barn Stores, Inc., et al. v. Grinnell Corporation, et al., (68 Civ. 4029)

and respectfully request fifteen minutes for argument on behalf of my clients in connection with the above captioned appeal, argument

EXHIBIT C-6

being scheduled for March 26, 1970.

Sincerely,

David Berger

DB:th
cc: Joel Hoffman, Esq.
Ira Milstein, Esq.

File [illegible]

C-7

WEIL, GOTSHAL & MANGES

767 FIFTH AVENUE · NEW YORK, N.Y. 10022
PLAZA 8-[illegible]800 CABLE ADDRESS "WEGOMA"

HORACE S. MANGES
ROBERT ABELOW
GABRIEL KASLOW
JOHN M. LEWIS
JESSE D. WOLFF
ARTHUR H. KREITZMAN
EDWARD C. WALLACE
ROBERT TODD LANG
IRA M. MILLSTEIN
MARTIN D. GINSBURG

PHILIP T. KAPLAN
MICHAEL A. STANTON
ARTHUR P. JACOBS
IRVING SCHER
STEPHEN E. JACOBS
HARVEY R. MILLER
GERALD S. BACKMAN
ELIHU FIER
PETER GRUENBERGER
CARL D. LOBELL

MARSHALL C. BERGER
ARTHUR F. APPLMAN
NATHAN COOPER
MYRON J. MEADOW
THOMAS P. CULLINAN
DANIEL SUGRUE
LEO L. SCHMOLKA
CARL A. SCHWARZ, JR.
GERALD M. FOX
A. PAUL VICTOR
STEPHEN F. SCHWARTZ
STUART M. ROSEN
SAMUEL M. LAITMAN
RONALD F. DAITZ
STEPHEN H. COOPER
LEONARD J. LEV
STUART D. AMES

BURTON SILVERSTEIN
PETER R. OHRBERT
MARK A. VOGEL
PETER D. STANDISH
ROBERT E. SCHUR
DAVID A. GRIFF
MARTIN D. AMOUR
ROBERT L. FATZMAN
EMIL A. ROPER
LAWRENCE M. DITTELMAN
BARRY FRANK
ALAN B. MILLER
ROGER A. GOLDMAN
JEFFREY DISSIN
CARL D. BELLOWS
BRUCE BODNER

CHARLES SELIGSON
COUNSEL

SYLVAN GOTSHAL 1931-1968
FRANK L. WEIL 1931-1957

EUROPEAN OFFICE
44, AVENUE DES CHAMPS-ELYSEES
PARIS 8e FRANCE
256-23-30

March 12, 1970

TO: All Subscriber Plaintiffs Counsel

Enclosed herewith is a copy of the brief we filed in the Court of Appeals relating to the Statute of Limitations issue.

The oral argument in this case is scheduled for Thursday, March 26, 1970. Counsel have been requested to respond to the court's calender call at 10:30 AM on that date, although the actual time for argument may be different.

Joel Hoffman will be arguing the case for plaintiffs-appellees. However, David Berger of Cohen, Shapiro, Berger, Polisher & Cohen has requested permission from the court to argue the case on behalf of his own clients.

Sincerely yours,

WEIL, GOTSHAL & MANGES

By A. Paul Victor
A. Paul Victor

APV:AR
ENC.

EXHIBIT C-7

C-8

August 14, 1970

A. Paul Victor, Esquire
Weil, Gotshal and Manges
767 Fifth Avenue
New York, New York 10022

Re: Grinnell - Answer to Petition for Certiorari

Dear Paul:

The following are my thoughts concerning how we should answer the defendants' Petition for Certiorari with respect to the statute of limitations issue in the above matter. As a preface, I think it is important that we confine our brief in answer to the issue of why the Supreme Court should not hear these cases and not to the issue of whether the defendants' contentions have any merit.

1. There Is No Conflict between the Second and Seventh Circuits by Reason of the Decision Below for the Following Reasons:

a. The decisions in the Seventh Circuit involved a different statute than the decision below in the Second Circuit.

EXHIBIT C-8

The Seventh Circuit's decisions relied upon by the defendants construed Section 5 of the Clayton Act, 15 U.S.C. §16, prior to its amendment in 1955. In contrast, the decision below by the Second Circuit construed Section 5(a) of the Clayton Act amended in 1955, 15 U.S.C. §16(a) and (b).

The Supreme Court requires that "The basic questions to be answered in determining whether under a given set of facts, a statute of limitations is to be tolled, is one 'of legislative intent whether the right shall be enforceable... after the prescribed time.'" Burnett v. New York Central Railroad Company, 380 U.S. 424, 426 (1965). The Second Circuit in the decision below complied with this requirement; it looked to the legislative intent in determining the extent to which the statute of limitations was tolled. The relevant legislative intent was expressed in conjunction with the promulgation of the 1955 amendments to Section 5 of the Clayton Act which resulted in amended Sections 5(a) and 5(b). Accordingly this legislative intent upon which the decision below was based was not before the Seventh Circuit in its decision relied upon by defendants nor was it relevant to the issues there at hand. Accordingly there can be no conflict between the decisions of the Seventh Circuit with the decision below by the Second Circuit.

Moreover the Second Circuit's decision below is in accord with and not in conflict with the cases of this Court and of other Circuit Court of Appeals which have interpreted and applied Section 5(b) of the Clayton Act, as amended 1955. Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co., infra; Leh v. General Petroleum Corp., infra; State of New Jersey v. Morton Salt Co., infra; Hardy Salt Co. v. State of Illinois infra; Maricopa County v. American Pipe and Construction Co., 308 F. Supp. 77 (D. Ariz. 1969); Dickinson, Inc. v. Kansas City Star Co., 173 F. Supp. 423 (W.D. Mo. 1959).

b. The Second Circuit clearly complied with the requirement contained in the Seventh Circuit cases that in determining whether or not a government proceeding continues to pend subsequent to a Supreme Court order of remand, the district court must scrutinize both the Supreme Court's opinion and order and the District Court's decree on remand. As stated in Tague v. Balaban, 146 F. Supp. 356, 359 (N.D. Ill. 1956), the court stated:

> "A study of the February 8, 1950 and February 7, 1952 decrees would seem to me to be the most logical and intelligent manner in which to approach the problem presented."

Indeed, this is exactly what the Second Circuit did in reaching the decision below:

> "...The Supreme Court's decision, United States v. Grinnell Corp., supra, left important matters open for determination on remand. The Court found it impossible to resolve on the record before it the extent to which long term contract and title retention requirements imposed on central station protective service subscribers constituted substantial barriers to competition requiring protective provisions. The district court was directed to explore the various aspects of the issue on remand and to fashion suitable protection provisions to deprive the two devices of whatever coercive power they might be found to have. 384 U.S. at 578. The Court also directed the district court to replace its broad and generalized restraining order with one specifically enjoining the precise practices found to have violated the Act. Id. at 579. Thus, significant issues remained to be decided by the district court. In this sense the Supreme Court's decision did not finally determine all issues of liability...." Russ Toggs, Inc., et al. v. Grinnell Corporation by Second Cir., No. 639 - 42 Sept. Term, 1969 (Second Cir., May 11, 1970) (Petition for Cert. at pages 38, 39).

To this extent, the decision of the Second Circuit below and the decisions of the Seventh Circuit were decided upon distinct and separate factual issues peculiar to each case. Accordingly, any difference in the results reached in these cases cannot be deemed a conflict in the legal applications of the Second and Seventh Circuits.

2. The Alleged Questions Raised by Petitioner with Respect to the Administration of Private Treble Damage Suits under the Clayton Act Have Already Been Resolved by Decisions of the Supreme Court.

Since the promulgation of the amended Sections 5(a) and (b) of the Clayton Act, the Supreme Court has issued two decisions interpreting the congressional intent underlying private antitrust litigation and in particular Clayton Act Section 5(b) and its relationship to 5(a). In *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) the Supreme Court held that proceedings by the Federal Trade Commission toll the running of the statute of limitations in a private antitrust case by reason of the provisionsoof Section 5(b) of the Clayton Act. Later that year the Supreme Court decided *Leh v. General*

Petroleum Corp., 382 U.S. 54 (1965) reh. den. 382 U.S. 1001, wherein the Court construed the scope of the words "based in whole or in part in any matter complained of in said proceeding" which appear in Section 5(b) of the Clayton Act. In so deciding that case, the Supreme Court reiterated the congressional intent underlying private treble damage actions and the tolling provisions of Section 5(b) of the Clayton Act.

Subsequent to the above cited Supreme Court cases there have been at least two Court of Appeals decisions applying Section 5(b) of the Clayton Act in light of the holdings in *3M* and *Leh*. In *Hardy Salt Co. v. State of Illinois*, 377 F. 2d 768 (8th Cir. 1967) cert. den., 389 U.S. 912 (1967), the Eighth Circuit Court of Appeals held that Section 5(b) of the Clayton Act tolled the running of the statute of limitations during the pendency of a government antitrust proceeding and for one year thereafter "as to a party named as a co-conspirator, and not as a defendant in the government litigation." 377 F. 2d at 769. In *State of New Jersey v. Morton Salt Co.*, 387 F. 2d 94 (3rd Cir. 1967), *cert. den.* sub nom., *International Salt Company v. New Jersey*, 391 U.S. 967 (1968), the Third Circuit Court of Appeals held that the tolling provisions of Section 5(b) of the Clayton Act applied to a subsequent treble damage action based in whole or in part on a prior government proceeding even as to defendants in the private action who were not named as defendants or co-conspirators in the related government action. It further held that Section 5(b) tolled the statute of limitations until the government proceeding was concluded as to the last defendant, even though a defendant in the government and private proceedings entered an earlier consent decree in the government proceedings and would otherwise have been protected by the statute of limitations. Both these cases applied the guide lines set forth in 3M and Leh. In bothcases petitions for writs of certiorari were filed and in both cases the petitions were denied.

In the cases sub judice, the Second Circuit in the decision below interpreted and applied Section 5(b) of the Clayton Act in light of the congressional purposes and intents as set forth in 3M and Leh and by the Eighth and Third Circuits in Hardy Salt Co. and Morton Salt Co. respectively. As certiorari was denied in the later two cases, certiorari should be denied in the present cases.

3. That portion of the decision below holding that the Government action continued to pend until one year after the time for appeal has expired is consistent with the congressional intent underlying Section 5(b). The Court below refused to apply "...a niggardly construction of the statute's language here in question", Leh v. General Petroleum Corp., supra, 382 U.S. at 59, and interpreted the statute "in a way which will permit a determination on the merits of private claims in this area" New Jersey v. Morton Salt Co., supra, 387 F. 2d at 97. Accordingly the Second Circuit's decision below was in accordance with a clear reading of the statute as applied by the Supreme Court and Courts of Appeals of various circuits. [Regardless of the treatment of this issue, it should be treated separately from the preceeding issues. If defendants' position here has any merit, then certiorari should be granted only in the cases directly involved in the ruling (four in number) concerning the appeal period.]

I will be more than happy to participate in the drafting of the brief in answer to the Petition for Certiorari. Please advise me of your schedule, including any drafting meetings.

With best personal wishes, I am

Sincerely yours,

COHEN, SHAPIRO, BERGER,
POLISHER and COHEN

H. Laddie Montague, Jr.

HLM,Jr./th

cc: Barry J. Brett, Esquire

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PARKER, CHAPIN AND FLATTAU
530 FIFTH AVENUE
NEW YORK, N.Y. 10036

ALBERT PARKER
SAMUEL M. CHAPIN
HENRY L. FLATTAU
STUART E GLOVER
MONROE CHAPIN
EMANUEL KLIMPL
IRVING P PERELSON
IRVING ROSENZWEIG
ALVIN M. STEIN

HERMAN GORDON
JAMES M JACOBSON
JOHN E JAY
HERBERT L ROSEDALE
SEYMOUR LEVINE
MARVIN H. KUCKER
SIMON JACOBSON
DONALD R LEVIN
ALAN J FISCHL

LEO MILLAR
MARK ABRAMOWITZ
NORMAN C BENTLEY
HARVEY M BONEPARTH
BARRY J BRETT
STEPHEN B OELMAN
LAWRENCE B FISHER
JOHN W FLATTAU
KENNETH M. GOLD
RICHARD E GUTMAN
STEPHEN F. HARMON
MYRON L KAPLAN
WALTER M. KAUFMAN
FREDRIC A. KLEINBERG

DAVID A LEFF
MICHAEL A LEICHTLING
HOWARD J LEVITZ
THEODORE J MALVIN
JORDAN M NEWMAN
PETER W PANACH
ROBERT K PEARL
BERNARD PERSKY
MICHAEL J SHEF
DANIEL SHERMAN
GODFREY J TENCER
STEVEN J WOHL
JOEL M WOLOSKY
MARTIN ZELNER

TELEPHONE
986-7200
AREA CODE 212

CABLE ADDRESS
LAWPARK

August 19, 1970

TO: Herbert Robinson, Esq.
A. Paul Victor, Esq.
Max Wild, Esq.
H. Laddie Montague, Jr., Esq.

Gentlemen:

There is enclosed herewith a draft of a brief in opposition to the petition for certiorari in the CSPS cases. Please review the enclosure and let me have your general comments before the end of the week. I would suggest that we plan on scheduling a meeting of our group in the very early part of next week.

Very truly yours,

Barry J. Brett

BJB:dmy
Enc.

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EXHIBIT C-9

C-10

WEIL, GOTSHAL & MANGES

767 FIFTH AVENUE • NEW YORK, N.Y. 10022
PLAZA 8-7800 CABLE ADDRESS: "WEGOMA"

HORACE R. MANGES
ROBERT ARCLOW
GABRIEL KASLOW
JOHN M. LEWIS
JESSE D. WOLFF
ARTHUR H. KREIDMANN
EDWARD C. WALLACE
ROBERT TODD LANG
IRA M. MILLSTEIN
MARTIN D. GINSBURG

PHILIP T. KAPLAN
MICHAEL A. STANTON
ARTHUR P. JACOBS
IRWING SCHER
STEPHEN E. JACOBS
HARVEY R. MILLER
GERALD S. BACKMAN
ELIHU FIER
PETER GRUENBERGER
CARL D. LOBELL

MARSHALL C. BERGER
ARTHUR F. ABELMAN
NATHAN COOPER
MYRON J. MEADOW
THOMAS F. CULLINAN
DANIEL SUGHRUE
LEO L. SCHMOLKA
CARL A. SCHWARTZ, JR.
GERALD A. FOX
A. PAUL VICTOR
STEPHEN F. SCHWARTZ
STUART M. ROSEN
SAMUEL H. LAITMAN
RONALD F. DAITZ
STEPHEN H. COOPER
LEONARD J. LEY
STUART D. AMES
PETER R. GILBERT

MARK A. VOGEL
PETER D. STANDISH
ROBERT E. SCHUR
DAVID P. GRIFF
MARTIN B. AMDUR
ERIC R. ROPER
LAWRENCE R. DITTELMAN
ALAN R. MILLER
ROGER A. GOLDMAN
JEFFREY L. DISSIN
CARL D. BELLOWS
BRUCE KOCHNER
GEOFFREY H. WHARTON
EDWARD M. ZINAMAN
SETH L. MELHADO
SPENCER W. FRANCK, JR.
WILLIAM R. FABRIZIO

CHARLES SELIGSON
COUNSEL

SYLVAN GOTSHAL 1931-1968
FRANK L. WEIL 1931-1957

EUROPEAN OFFICE
44, AVENUE DES CHAMPS-ELYSÉES
PARIS 8e FRANCE
256-23-30

phoned in changes to P. Victor on 8/28/70. HLM.

August 25, 1970

TO: ALL COUNSEL INVOLVED IN THE STATUTE OF LIMITATIONS MATTER IN GRINNELL CORPORATION, ET AL. V. RUSS TOGS, INC., ET AL. (U. S. SUPREME COURT NO. 499)

Gentlemen:

Enclosed for your comments is the draft brief in opposition to the petition for certiorari.

The printed brief must be filed with the Supreme Court on September 4, 1970. Accordingly, please telephone any comments you may have to either Barry Brett or myself no later than Monday, August 31.

In addition, I am enclosing herewith a copy of petitioners' notification that they filed the petition, and an appearance form which must be filed by each of you "or other counsel who will represent your party, with the Clerk at or before the time" the brief in opposition is filed. I have taken the liberty of designating myself as the counsel who should be notified by the Court as to the outcome of this matter and who will, in turn, notify each of you. I would appreciate your completing the attached form and mailing it to me as soon as possible so that it can be filed with our brief in opposition on September 4.

Unless we hear to the contrary from any counsel, we must assume that you agree with the brief in opposition.

Sincerely yours,

WEIL, GOTSHAL & MANGES

By A. Paul Victor
A. Paul Victor

APV:AR
ENC.

EXHIBIT C-10

"D"

November 16, 1970

Barry J. Brett, Esquire
Parker, Chaplin & Flattau
530 Fifth Avenue
New York, New York 10036

Re: Grinnell Cases

Dear Barry:

I was greatly disturbed and annoyed to learn from your
letter of November 10, 1970 that a meeting of "lead counsel" had
been held concerning the future progress of these actions and
that our office was not apprised of such meeting. As you know,
we have participated in every phase of this litigation, have
attended and contributed to all similar past meetings, and have
contributed heavily to the matters completed to date. Without
regard to any nomenclature as to "lead counsel", we have always
taken an active role in all antitrust litigation in which we
participate, especially where our clients, as here, are representa-
tive of national classes. I was surprised at your omission to
notify us and hope that it was inadvertent. With respect to
future meetings, I anticipate that we will be notified.

With respect to the matters set forth in your letter, we will certainly participate in the research relating to theories of damages and proof thereof. I will forward a separate letter in answer to the substantive aspects raised in that letter.

Sincerely,

David Berger

DB:th

EXHIBIT "D"

U.S. District Court
Filed
MAY 30 1972
S.D. of N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.) 68 CIV. 4026
v.)
GRINNELL CORPORATION, et al.) (E.D.Pa. Civ. 68-1478)

MANHATTAN-WARD, INC., et al.) 68 CIV. 4028
v.)
GRINNELL CORPORATION, et al.) (E.D.Pa. Civ. 68-1489)

1225 VINE STREET BUILDING, INC., et al.) 68 CIV. 4027
v.)
GRINNELL CORPORATION, et al.) (E.D.Pa. Civ. 68-1479)

RESPONSE OF BAY FAIR SHOPPING CENTER, ET AL., TO "PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF HIS REQUEST FOR ATTORNEYS' FEES AND CONTRA OBJECTIONS THERETO"

Petitioner's memorandum filed in reply to Objections to his attorneys' fees quotes from an affidavit filed by Harold E. Kohn, Esquire, in Lindy Bros. Builders, Inc. of Phila., et al. v. American Radiator & Standard Sanitary Corporation, et al. (E.D.Pa. Civ. No. 41774 SC); further, a copy of that affidavit is appended to Petitioner's reply memorandum as Exhibit A. However, the affidavit of William Simon which was filed in response to Mr. Kohn's affidavit in that case has not been presented to this Court. A copy is annexed hereto as Exhibit A.

Dated: May 26, 1972

William Simon
WILLIAM SIMON
G. JOSEPH KING
HOWREY, SIMON, BAKER & MURCHISON
1707 H Street, N.W.
Washington, D.C. 20006
(202) 298-6450

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LINDY BROS. BUILDERS, INC. of PHILA., et al., Plaintiffs, v. AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, et al., Defendants.	)	Civil Action No. 41774-SC

DISTRICT OF COLUMBIA)
CITY OF WASHINGTON) SS.

AFFIDAVIT OF WILLIAM SIMON IN RESPONSE TO AFFIDAVIT OF HAROLD E. KOHN RE OBJECTIONS OF FRIENDSWOOD DEVELOPMENT COMPANY, ET AL.

WILLIAM SIMON, being first duly sworn under oath, deposes and says:

During March 1972, I did speak with Mr. Kohn in connection with another matter as stated in the first paragraph of his affidavit. I did not, however, as stated in the second paragraph of his affidavit, bring up the subject of Humble's intention to file objections to his petition for allowance of counsel fees in this case. We had previously

EXHIBIT A

asked this Court for an extension of time within which to file such objections; and Mr. Kohn, noting that request to this Court, raised the subject and asked me to reconsider our filing such objections. I told him we would reconsider it and I subsequently advised him that we had reconsidered and determined to file the objections. The self-serving statements by Mr. Kohn on the second page of his affidavit were not stated to me by him.

I did not tell Mr. Kohn that we intended to file objections "to straighten out class suit law," as asserted in the second paragraph of page 2 of his affidavit; but I did tell him that a purpose of our filing these objections was our interest in class suit litigation. He did tell me that he would feel obliged to inform the Court in the Plumbing Cases of our motive in objecting to his fees: Our motive was and is the administration of justice in class suit litigation and the protection of our clients' rights in this litigation. I feel that, in an adjudicatory proceeding, the Court is entitled to have the views on both sides of an important matter, and that a Court should not be asked to award some $10 million in fees merely because lawyers with a community of interests seeking to divide up those fees are generally willing to have the Court award fees of that magnitude; as is often the case in class action litigation. In this instance, I recognize that various lawyers oppose the fee applications of others; and peculiarly some lawyers not seeking fees support Mr. Kohn's application; and I would expect all plaintiffs' lawyers, including Mr. Kohn, to seek fees from this

Court in their clients' behalf to offset their clients' fee burden to them. In view of the foregoing, therefore, I think it constructive in the administration of justice that the Court have the views of counsel on this important subject who do not represent named plaintiffs in this case, who had no fee understanding with Mr. Kohn, and who are not seeking fees from the Fund.

My clients are being asked to pay $17,000 in attorneys' fees out of the claims which have been allowed to them in this proceeding. The fact is that the allowance of these fees will diminish the recovery of our clients by $17,000. Thus, the views expressed in our Objections filed in opposition to all fee applications advance substantial interests of my clients. Furthermore, they are wholly in accordance with the interests of all class members.

There is no question but that one of the Objectors herein is engaged in other litigation with Mr. Kohn in which I am its counsel. I assume that each contention which I urge in each of these cases will be accepted or rejected on the merits by each court passing judgment thereon.

William Simon
WILLIAM SIMON

Sworn to and subscribed before me
this 5th day of April, 1972.

Notary Public

My commission expires August 31, 1972

CERTIFICATE OF SERVICE

I hereby certify that I have this twenty-sixth day of May, 1972, served by United States mail, postage prepaid, a copy of the foregoing Response Of Bay Fair Shopping Center, et al., To "Petitioner's Reply Memorandum In Support Of His Request For Attorneys' Fees And Contra Objections Thereto", upon the following: David Berger, Esquire, 1622 Locust Street, Philadelphia, Pennsylvania, 19103; Breed, Abbott & Morgan, 1 Chase Manhattan Plaza, New York, New York, 10005; Herbert Brownell, Esquire, Lord, Day & Lord, 25 Broadway, New York, New York, 10004; Cadwalader, Wickersham & Taft, 1 Wall Street, New York, New York, 10005; Clare & Whitehead, 30 Rockefeller Plaza, New York, New York, 10020; Cutler & Cutler, 150 East 58th Street, New York, New York, 10022; Joel E. Hoffman, Esquire, Wald, Harkrader & Ross, 1320 Nineteenth Street, N.W., Washington, D.C., 20036; Harold E. Kohn, Esquire, 1214 IVB Building, Philadelphia, Pennsylvania, 19103; Samuel W. Murphy, Jr., Esquire, Donovan, Leisure, Newton & Irvine, 2 Wall Street, New York, New York, 10005; and Simon H. Rifkind, Esquire, Paul, Weiss, Rifkind, Wharton & Garrison, 345 Park Avenue, New York, New York, 10022.

G. Joseph King

G. Joseph King

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - x

CITY OF DETROIT, et al., :

Plaintiffs, : 68 Civ 4026

vs. :

GRINNELL CORPORATION, et al., :

Defendants. :

- - - - - - - - - - - - - - - - x

United States Court House
Foley SQuare, New York
May 24, 1972
4:40 P.M.

Before:

HONORABLE CHARLES M. METZNER,
U. S. D. J.

Appearances:

David Berger, Esq.
H. Laddie Montague, Jr., Esq.
Herbert Brownell, Esq.
Gordon B. Spivack, Esq.
Bud Holman, Esq.
Harvey S. Kronfeld, Esq.

Appearances (Continued)

Denis McInerney, Esq.
Thomas F. Curnin, Esq.
Claude K. Jack, Esq.
Macdonald Flinn, Esq.
Thomas McGanney, Esq.
George D. Reycraft, Esq.
William F. Sondericker, Esq.
Joseph M. Burke, Esq.
Samuel W. Murphy, Esq.
Thomas F. Munno, Esq.
Simon H. Rifkind, Esq.
Max Gitten, Esq.
A. Paul Victor, Esq.
Henry J. Silberberg, Esq.
Philip B. Trost, Esq.
Leon P. Calafiura, Esq.
Mortimer M. Lerner, Esq.
Ronald S. Daniels, Esq.
Nathaniel Whitehorn, Esq.
Richard Cashman, Esq.
Walter D. Ford, Esq.
Herbert Robinson, Esq.
Jack Klein, Esq.
William Simon, Esq.

MR. SIMON: Your Honor, could I suggest there is a fourth item --

THE COURT: What is your name, please?

MR. SIMON: My name is William Simon. I represent Bay Fair Shopping Centers. We had a notice returnable today for 4:30 for an videntiary hearing before either the Court or a Magistrate or Special Master for taking of evidence on the reasonableness.

THE COURT: That will be determined after I hear the counsel today on the reasonableness of the hearing. I won't automatically direct an evidentiary hearing take place.

MR. SIMON: May I then call your Honor's attention to the fact that the notice you sent out to all members of the class over your signature on December 13th say thatby order of December 13th, any member of the class who has not requested exclusion and who desires to be heard in person or by counsel may appear at this hearing, originally set for April and continued to today, and then I quote from the notice ". . . and present any evidence that may be proper and relevant to the issues."

If there is to be such a hearing, I do propose to present evidence.

THE COURT: Let's do one thing at a time.

MR. SIMON: : Very well.

THE COURT: Consequently, I will start now and go to six o'clock with argument on the reasonableness. At that time we will adjourn until tomorrow morning at either nine thirty or ten and go to 12 o'clock.

At that point I am not available until June 5th because of other commitments.

I will now adjourn to ten o'clock, June 5th, in room I think it is 1106, the motions regarding counsel fees, the reasonableness of the counsel fees requested by counsel for the plaintiffs in the national class action, and the applications by the troika and I think by a Mr. Hoffman, I am not quite sure of that name, regarding portions of the fee.

Those two matters will go over to ten o'clock June 5th, Room 1105.

Those of you who wish to stay, fine.

MR. RIFKIND: You said 1106 then 1105.

THE COURT: My clerk tells me 1105.

unchallenged.

THE COURT: This is a supplemental exhibit A through D in the original affidavit?

MR. BERGER: Yes.

THE COURT: Incidentally, have the proofs of service of the original notice of December 13th been filed? Has defendant sent that out, Mr. McInerney? Did you file affidavits of service for the original mailings of December 13th?

MR. McINERNEY: I am told that we have, your Honor.

MR. BERGER: If it please your Honor, I will try to be brief concerning why I think the settlement is fair and adequate and reasonable, and indeed, in view of the terms of the proposed settlement, when we compare it, we see it is not only reasonable but fair.

As your Honor knows, this settlement calls for total payment of cash of ten million dollars plus interest at one percent above prime. If we take the current rates and assuming the defendants take the time which they are permitted under the terms of the settlement, this would amount to some $700,000, roughly, in interest.

The classes, your Honor, are given the broadest geographical, that is, national scope, and as a result we have such entities as banks, churches, religiously affiliated entities who are in the group and in the classes which are permitted recovery here.

I would point out to your Honor, the time period here in this settlement is unusually long. It is eleven and a quarter years, April 1, 1957, to July 11, 1968.

When we compare that, your Honor, with what I would say is the usual time period for settlement in an antitrust class action, we find that this is very very favorable. For example, concrete pipes, bakery products, plumbing fixtures, rock salt, library books, all those settlements, your Honor, were before your period and here we were able to persuade the defendants to include in the settlement, from April 13th, 1957, which was four years back of the time when the Government started its action, until July 11, 1968, which was the day of the final decree and the day we filed our action and sixty days before the running of the final appeal period.

We would also point out to your Honor that the cases which I have cited in which there were only four year periods for settlements were straight price fixing cases and unlike, as the various papers have pointed out to your Honor, in this case, where you are dealing realistically with a Section 1 case, a monopolization case and that presents very complex problems which were absent in those other cases.

I would also point out to your Honor that the type of notice is of great significance here and also that the defendants have borne the expense.

The defendants at our request and pursuant to your Honor's order mailed out all their current subscribers' notices so that there are 89,000 pieces of mail. We had this published in The New York Times and The Wall Street Journal once a week for three successive weeks. All of this cost some $37,000 with no expense to the class.

I think most significant is the content of the notice. We actually encouraged the participation by the class members in this because the $10 million proposed settlement figure was indicated, the notice of course, of the application of fees was in there, and we know that we had the allusion in the notice to the problem of statute limitations, which is very serious, so that all of this was brought forward to the class by way of notice.

I would say that the results indicate how good that notice was, because of the tremendous response which we have had.

Now, when we consider the kinds of claimants that have come in, some 14,150 claimants, your Honor, the vast majority of these are small claimants, some of them in this courtroom, who have indicated that they would not but for this class action have participated in this litigation in any way at all.

Moreover, in a vast majority of the 14,000 claimants, over 8800 of them are from cities which I know your Honor realizes what I mean when I say this, are competitive cities, and I shall refer a little later to the problem of the competitive cities as to the problem of damages.

The result is that when you look at the total volume, dollar volume of transactions, and you get into the question of percentages, that the result is also excellent.

For the eleven-and-one-fourth-year period your Honor, the total purchases, total dollar volume of transactions amounted to some $800 million.

Your Honor will recall that we do not represent some fifty-five individual claimants who have substantial claims and who had brought those cases themselves, nor do we represent some three states represented by Perry Goldberg; so that we have estimated --

THE COURT: Incidentally, have any of the individual subscriber cases failed to file notices to opt out so they would be included in the settlement?

MR. BERGER: Yes, your Honor.

THE COURT: Mr. McInerney?

MR. McINERNEY: Two or three of them have filed notices to opt out. Eleven individual subscriber cases affirmatively have come in and filed statements of claim and wish to participate in the settlement.

THE COURT: Thank you.

MR. BERGER: Your Honor, going back to the figures just briefly, we have 800 million as a universe of transactions of all the defendants for the eleven-and-one-fourth-year period here involved. Fifty million should be subtracted from that as that being the cases we don't represent, individual and Perry Goldberg's cases, so that leaves about $750 million in transactions total.

We compared that with the figures in plumbing and concrete pipes and the various other cases I have mentioned and it comes out very, very comparable.

In terms of percentages, those who came in, that is, the people who have responded -- the affidavit of Mr. Monagua reveals today the total number of claims filed is 14,156, with a total dollar amount of transactions filed of some 330 million, with a total dollar amount of transactions challenged of some 37 million, with a total dollar amount of transactions unchallenged, 292 million.

THE COURT: Did you take the eight percent excise tax off?

MR. BERGER: Yes, that would give us, roughly, another 25 million, so we are talking about some 275 million, roughly.

Now, if you consider then gross recovery of $10 million here, your Honor, we are talking about a percentage which varies somewheres between 3.5 or 4 percent. That is for eleven-and-a-quarter years, so that if we adjusted that percentage for four years which is the normal one that I pointed out to you, your Honor, we would have between 9 and 11 percent.

Let me ask at this point, Mr. Berger. You speak of the four-year period being a normal one. Is that simply because that was the basis of settlement or because the courts have indicated that that would be a proper period?

MR. BERGER: Both, sir, and the courts have so indicated and I think it is pretty well understood that when you settle one ofthese cases, your Honor, the time taken is normally four years prior to the institution of the United States of America suit, and that would have taken us from April 17, 1957, to April 23,1957, to April 23, 1961, but we included seven additional years.

THE COURT: Why the four years?

MR. BERGER: That is the statute of limitations and so it has become not only customary, I would say it is quite a tradition. When you settle these cases on a four-year period, case after case has been settled. We said, not in this case, We would rather take our chances and come in before your Honor and say we think we have done the best job that could be done for this class and get eleven-and-one-fourth-years than to come in and say our percentage is 11 percent rather than between the 3.5 and 4 percent, because we know your Honor will understand that you adjust that eleven and a quarter period down to the normal four-year-period and you come up with something between 8.5 and 11 percent.

So, that is the reason why we think it is a very striking result for our class.

Another point I would point out to your Honor with your Honor's permission, by virtue of the economy of time and effort in this case, we have kept our costs to a bare minimum. In fact, at the time your Honor directed the notice be sent out, our costs amounted to some $5,000 disbursements, and today with the computer and everything we have with the 14,156 claimants, your Honor, each one impeccably administered, we are still under $25,000 total which is a fantastically small sum when you compare it with, take plumbing, which Judge Harvey had only a month ago, where the total amount of disbursements up to this point exceeds $360,000.

Your Honor, I would like to say this. If we are going to take comparisons, I think it is not irrelevant to do so, and that the $10 million settlement which we propose to your Honor here is one of the highest that has been achieved in class actions since the electrical cases. Of course the antibiotics before Judge Wyatt is the biggest, but other than that we have the copper pipe case which is some $23 million, the plumbing case, $24 million, and after that you have concrete pipes of $5 million, library books of $6 million, and here we have $10 million.

When one considers that without the institution of this class action, without our prosecuting this class action and we, of course, as your Honor knows, are the only lawyers that did that in the United States, without that there would be no recovery at all for any of the people in this class, the 14,000, otherthan those who actually instituted suits beforehand, before the statute had run.

Now, in making your Honor's decision, of course the cases are clear and they are in our papers, you will determine what were the hazards of litigation. We do not believe that it is proper, as some suggest, that we should try this case before your Honor right now to determine whether or not the settlement was reasonable, but we do say, your Honor, that the hazards of litigation are something that must be considered and considered very carefully.

I normally take with a grain of salt what the defendants say, especially in antitrust cases, but they have filed a printed memorandum which goes into great detail on what they say are the weaknesses in our cases.

I would just simply say to your Honor, no, we don't agree with that, because we take a different position, but we are not callously unmindful of the serious nature of the arguments which are projected in this memorandum, and I would just briefly point out some of the problems that trouble us.

First, whether your Honor would uphold the classes.

Second, whether your Honor would uphold the classes in the scope we desire, namely, nationally, let alone from a definitional point of view.

We have had some problems. You take the copper case, Judge Fullum, when we sought a national class, cut it down. He cut it down to all Governmental entities of 40,000 and above.

Recently in the auto fleet case, Judge McGarr out in Chicago he refused to certify a national class of Government entities.

We don't say that those judges were right and we don't say that your Honor would be correct in turning us down on a national class. What we are saying,we are not unmindful of the fact that, and this applies to some of the objectors, that when they come in in the true guise as anti-trust defendants, they are the ones that shout so loudly that the individual variations and the importance of localities and the unmanageability and things of that kind to try to strike down the classes and of course even if your Honor decided the case and gave us the class, it is only a tentative decision. Your Honor has the power to change that, so we recognize that as a problem.

We recognize another serious problem. The defendants say that the whole issue of impact, and particularly of liability, they say, is one which they want to litigate if we don't settle this, they will demand jury trials with respect to each of those 14,156 claimants.

THE COURT: I asked Judge Wyatt what he would do if he had that happen to him in the antibiotics cases and he said he would resign from the bench.

MR. BERGER: We think we have some less Draconian answers to that, alternatives, but still, in all candor, your Honor, we recognize this as a problem. That is a problem which is being eliminated by virtue of this settlement.

We think that the time period of eleven-and-a-quarter years presents a very serious problem. If your Honor doesn't approve this, we will have quite a problem to persuade your Honor on the record that we can go for the entire eleven-and-a-quarter years.

In any event, even if your Honor would not agree, if this were turned down and we had to go to trial and your Honor forced us into the 14,000-some-odd jury trials on that issue, in any event, the problem of extensive litigation and extensive discovery and motions relating to that is just something that is horrendous to behold.

These are some of the problems but I want to come to the one, if I may use the phrase, gut issue in this.

The defendants mention it. As I say, I take what they say with a generous grain of salt. One of Americas foremost lawyers who represents plaintiffs, and he was before Judge Wyatt in that anti-biotics case, David I. Shapiro, has filed an affidavit. We have an affidavit from him which was filed and he represented competitors and he says that it always was and still is his opinion that the only ones who had any damage, who suffered any damage were the competitors.

Your Honor knows this case too well for me to labor that point. This is the problem we have. The thrust of the Government's case is predatory price cutting and the defendants say how are you claiming damages? You actually received a benefit, you didn't suffer a damage, and here we have Mr. Shapiro who represented thirty-six competitors and what do we find? He says the same thing. He says we don't even have the ability to prove damages.

We think we can prove damages, but this is a very serious question and we say to your Honor that with this kind of serious question involved, and bearing in mind what I told your Honor, that

8800 of the 14,000 claimants are from the competitive cities alone, so that the vast majority of 62 percent in number in amount of claims are directly within that area which the Government and the Government decree found was the area in which the defendants predatorily cut their prices.

I think your Honor will understand that that is a serious question of fact in law.

May it please your Honor, these serious questions of fact in law, these questions loom before us and with your Honor's approval we avoid them.

Instead, we have a settlement, $10 million, one ofthe highest, as I said before, that has been achieved. We have given the most faithful universal application to that settlement across the boards, across the country. We have given the best notice possible. We have brought in 14,156 claimants, the overwhelming majority of whom do not object to the settlement, nor to the fees, for that matter, and we have done so in a way without which it would be impossible, and certainly, unlikely they would be able to participate in this.

We think, your Honor, this is a good settlement and that substantial justice will be done and therefore request your Honor's approval.

THE COURT: Mr. McInerney, to round out the presentation in favor of the settlement, I suggest you speak, if you are the one to speak , in behalf of the defendants.

MR. McINERNEY: Thank you, your Honor.

I am well aware your Honor has had a tremendous pile of papers put before you and you have already seen a great deal of these and they treat of the subject of settlement, I am sure exhaustively and I fear exhaustingly as well, so I am not going to take very much time on it.

I notice that your Honor mentioned the four-year period and why that was the usual period of settlement of such cases.

Mr. Berger quite properly pointed out that it is the statute of limitations, but in addition in this case, your Honor, the Government records stopped at the same year that the case started. In other words, the evidence in the Government's case only goes to 1961, so there is another additional and very substantial reason for having only a four-year period of settlement here.

In order to fully dispose of all the claims in these cases, we were willing to go and tag another seven years on to that, even though the Government record would not substantiate any sort of a prima facie claim with respect to those latter seven years.

Your Honor, defendants' position, I think, has been made clear consistently that we don't feel that these are proper class actions to begin with. We think for that reason and also because any claims of these alleged class members would be barred by the statute of limitations, and finally because we don't believe there is any merit to these claims in any event for some of the reasons that were alluded to by Mr. Berger.

It seems to us that this $10 million figure is overly generous, perhaps grossly excessive, but we are willing to pay that amount because we would like to avoid the horrendous prospects of harrassment that are involved in alleged class actions of this kind so we are willing to buy our peace at that figure.

The objectants, as Mr. Berger mentioned, I don't think he mentioned the percentage, they are an infinitesimal small percentage of the people who have filed statements of claim. One half of one percent, whether you judge it by number of claimants or by dollar volume.

They are represented by five law firms, only one of which has any familiarity whatever with these cases, Judge Botein's firm, and I seriously doubt of that firm with these cases because their appearance has not been very marked in any of these proceedings previously, but they did represent one individual subscriber plaintiff --

THE COURT: They filed papers with me several years ago in motions that I decided, I remember that.

MR. McINERNEY: And the plaintiff they represented on that occasion and still do, is one of the individual subscriber plaintiffs who had brought suit and who has not opted out but has filed a statement of claim, apparently accepting the settlemnt but then coming in and objecting to it on this occasion, on the theory that they weren't aware of the small settlement it would be when they filed their statement of claim.

That is the only firm or lawyer as far as I am aware that had any previous familiarity with these cases, that possible exception, representing an objectant.

As a matter of fact, several of the objecting counsel have filed motions with your Honor asking for a delay of these proceedings -- I must commend the candor of one of them. The motion is entitled "Motion to Delay Settlement." That is what it is.

The basis for some of those motions is the very fact that counsel pleading ignorance about what these cases are all about. They say that because of that they must have discovery before they can tell whether or not this is a proper settlement.

We submit that those motions are particularly inappropriate in a case such as this where you had monumental pretrial discovery in the Government action; you had a full trial of the Government action; the record on appeal to the Supreme Court which, of course, is an abbreviated version of the trial record and would not include a lot of the pretrial discovery which consists of eleven volumes, six thousand printed pages, which we will be happy to file with the Court if the Court has no objection.

THE COURT: I object.

MR. McINERNEY: But that record alone is a very good outline of what these cases might be about.

In addition to that, we had tremendous pretrial discovery, hundreds of thousands of pages, and well over one hundred depositions in that case. Those documents have been available in our depository or in the public files of the Anti-Trust Division in Washington for many years.

We have had tremendous pretrial discovery in these cases alone. I think your Honor will recall we had one answer to one interrogatory that went on for three thousand pages.

With all that, it seems to me particularly inappropriate for anyone to now move for further discovery before they can determine whether or not this is a proper settlement.

I think that the voluminous discovery here is almost unprecedented. I think that anybody who has been sitting around for years either knowing of the fact of these cases as is the case with one law firm, or knowing nothing about it until recently and having only recently come into it and trying to go through and find out what the case is all about so they can weigh settlement themselves, that those considerations of giving them time really are considerations that should not delay the settlement of these actions at the expense of parties who have been laboring, giving discovery, actively litigating the case for years.

On the other hand, in contrast to the objecting counsel, counsel who favor the settlement, who have clients favoring the settlement include lead counsel for the subscriber plaintiffs in these cases, the famous troika. They include other law firms who have come in and prosecuted individual actions on behalf of individual subscribers and who now nevertheless are willing to forego those actions and have filed statements of claim to participate in the settlements.

There are eleven such cases listed at pages 45 and 46 of our brief. Those are counsel that are entirely familiar with these cases and that realize the value of these settlements.

Now, I don't want to take up much of your Honor's time. I would like to have an opportunity for some rebuttal later on.

THE COURT: Don't you think you ought to mention what you think of the weaknesses in the plaintiffs' case? That is the whole purpose of the hearing on the settlement. The courts have said you have to weigh the strength and weaknesses of the plaintiffs' case against the amount that has been offered in settlement. You seem to have a burden in that area according to the decisions.

MR. McINERNEY: We have submitted to your Honor a brief of some sixty printed pages with respect to that but I will be happy to outline --

THE COURT: I think you ought to for the record and for the people sitting here so they can get up and talk against it if they wish to.

MR. McINERNEY: Very well, your Honor.

To begin with, these are really not proper class actions. We have here three amorphous groups "defined" in the complaint, so that nobody really knows what they include and because of that difficulty, and since it was a settlement and we felt we were somewhat constrained by the way the complaints were worded, we sent out notice to everybody who might possibly be included in any of those groups.

Now, apart from the difficulties of definition of class, the tremendous number of people involved in the class or the alleged class or classes, there is the basic defect that there was never any need for a class action here to begin with.

As Mr. Berger has noted and as we have mentioned several times, these claims are claims for treble damages where the successful party gets attorney's fee awarded at the same time. They are rather substantial claims. A great many of them are in excess of $200,000.

That is not the kind of a case that ought to be a class action at all. That there was never any need for a class action is demonstrated, in my view absolutely, by the virtually unprecedented number of individual cases that have been burdening this Court for quite some time being prosecuted by individual counsel.

The further difficulties include that within these classes are people, most of whom actually benefitted from the alleged predatory conduct of the defendants by way of being the beneficiaries of price wars.

THE COURT: You mean competitive cities?

MR. McINERNEY: Yes, your Honor, in competitive cities.

Further, in so-called non-competitive cities, we don't concede they are non-competitive because we have a different view of what the relevant market is.

THE COURT: I think this is an important area and those gentlemen who are going to speak against the settlement ought to address themselves to it.

The Supreme Court split five to four as I recall on the issue of definition of relevant market and Justice Fortas writing a separate concurrence but dissenting in that area and suggesting it be sent back and Justice Harlan --

MR. McINERNEY: My recollection is three dissenting.

THE COURT: And with all of the discussions that have taken place since then among judges, certainly there has been great disagreement with what the Supreme Court did and at best it is only prima facie evidence that you go to trial.

MR. McINERNEY: That is absolutely correct, and I might also point out that the trial judge himself, according to The New York Times, which is the only source I could quote on this, has said that he himself --

THE COURT: After he read Justice Fortas's opinion, he should have gone the other way.

MR. McINERNEY: Yes. I think there is substantial doubt as to how much anyone can rely on that decision as defining any relevant market, but in addition, the most that can be said is, that it defines a gerrymandered national market and these people bought distinctly localized services and they are going to have to establish what the facts were, each of them, with respect to his individual area where he bought what are in fact custom-tailored services, so each one is different.

Those are all reasons why this isn't a class action as well as being reasons why there are substantial barriers between any claimant or plaintiff and any judgment in these cases.

In addition to that, and I might also point out, these things sort of overlap, because in addition to those barriers between these claimants and any recovery here, they are also barriers for Mr. Berger to be representing these people who are really in different situations. One fellow was in a competitive city and he has in my view no claim. Another is in a so-called non-competitive city in the sense there is not an accredited central station in his city, but there may be an unaccredited central station or there may be other forms of protection in his city and those people have a different claim.

Some people shopped around and minimized damages and other people didn't. They are not really any kind of a homogeneous class that anyone would find in a price-fixing case for a fungible commodity, for example.

Again, before any recovery could be had here, in addition to showing the impact on the alleged class members, the precise amount of damages would have to be determined, so we have to get some kind of a mythical theoretical competitive price for each of the 115 different markets that are involved in these cases.

THE COURT: Let me ask you, is that really a question to be determined on a class action or is that reserved for damages?

MR. McINERNEY: I was passing on, your Honor, to the problems, if your Honor should decide these were class actions, then you would have these further difficulties, and they are enormous difficulties, for even one particular market. You wouldn't even have a so-called competitive price, singular, for everybody who operated in that particular market because each of these services was tailored to the individual needs of the owners of the premises and in some cases they would have alternatives available to them that they would not have in other cases, depending on what kind of business they were in, whether they were interested in fire protection, burglarly protection, industrial process, supervision protection, sprinkler service protection, or whatever it might be.

All of these things are not only weaknesses in the plaintiff's case, but they give, your Honor, some idea of what a horrendous problem it would be to go ahead with these cases if they should be determined to be proper class actions which we insist they are not.

But because of these horrendous prospects and the opportunities for harrassment that they give to a plaintiff who claims to represent this amorphous class, it seemed to us that the better part of valor was to try to settle these cases and that is what we have tried to do.

If we cannot settle these cases, we intend to defend them very vigorously. We would intend to have a jury trial on the issues of damages. We have available to us only a small amount of discovery with respec t to anybody presently before the court with respect to -- who are coming in now as claimants and new, and we are, I think, entitled to discovery of them.

There are a tremendous number of procedural and practical problems that we would just have to live with. We don't relish the prospect of doing that anymore than I am sure the Court does, or Mr. Berger, or any of the parties who have some familiarity with these cases.

Therefore, we were willing to come in and try to settle these cases on this basis.

For all of those reasons, it seems to us that this settlement, I think, is generous, but at the very least, it is fair and reasonable to people who, really, basically, in our view at least, have no claim whatever, your Honor.

THE COURT: All right, Mr. McKnerney. I should say to round out the record if there is a fear on my part that I might have to try the case and therefore I should approve the settlement, I should point out to you that I am only a judge appointed under the direction of the panel on multi-district litigation and one of my good colleagues in Philadelphia would get this case back. It is not initiated in this district, it comes from the Eastern District of Pennsylvania.

MR. McINERNEY: I am not wishing it on your Honor but your Honor would be so familiar with these that notwithstanding the budgeting costs that we were incurring in terms of labor cost, equipment, the time expended in providing services, thereafter the effective price increase had not exceeded 5 per cent per year. During that period he pointed out that it did not exceed the comparable increase in their cost in that period of time.

One last point to put this all in perspective, the record in the enforcement action shows that after 1961 through the entire balance of the period covered by the proposed settlement, i.e., seven additional years, ADT never raised its prices again.

THE COURT: Mr. Berger.

MR. BERGER: May it please your Honor, I listened to Mr. Kronfeld and I couldn't help note and I would point out to your Honor that either there is a real naivete about settling cases of this nature and complexity or total ignorance, designed or undesigned of what the case is all about.

He relies so heavily on the O'Brien memo that we put in our brief at pages 12 and 13 in the class action argument and we argued that at length before your Honor, and, of course, there is an answer to it, as Mr. Flinn just pointed out, but ignores that.

The review of the government case, your Honor, shows that it was indeed a predatory pricing kind of case. Judge Wyzanski's opinion, regardless of whether the Judge would change his present view in view of what Justice Fortas said, makes this clear and he provided -- I'm sure that Mr. Kronfeld has not studied this -- that the government was entitled to a decree, including a provision requiring each affiliate notifying the government when he quotes to any prospective customer prices or terms lower than that affiliate's own schedule, so you see that it was a price-cutting case, and it was a situation in which there was no attack on the MBR itself, the Minimum Basic Rate, and that what he ignores, Mr. Kronfeld, is that the contention has been made and can very strongly be made not only in the class action itself, but in the trial of this case should your Honor reject the proposed settlement --

THE COURT: I said yesterday I wouldn't have the honor of trying it.

MR. BERGER: Should any federal judge have that honor, sir, it would then result in a very serious question whether any of the so-called thousands, as Mr. Kronfeld said, who are damaged throughout the United States indeed suffered any damage.

THE COURT: Mr. Kronfeld, have you ever read the deposition taken, I think it was in Wisconsin, the one and only joint deposition we attempted in this case, between competitors and subscribers?

MR. KRONFELD: I'm not familiar with that.

THE COURT: Mr. McInerney, do you have a copy of that?

MR. McINERNEY: Not with me.

THE COURT: I assume not. Would you mind letting Mr. Kronfeld read that?

MR McINERNEY: I certainly will, your Honor.

THE COURT: The subscribers yelled like stuck pigs at the deposition being conducted by competitors because they were being pushed out of the lawsuit.

MR. BERGER: Mr. O'Brien was deposed. He was deposed in Philadelphia by a Philadelphia competitor and what came out there is not very helpful to the subscribers because this is the very unhappy dichotomy that exists between the competitor cases and the subscribers and as the government said, this is a documentary case. We have had, contrary to what Mr. Kronfeld has said, interrogatories answered in depth. We have had documents by the thousands and we have analyzed them.

I would like to talk for a minute, if I may, your Honor, about this period of time because that has been stressed so by Mr. [illegible]. You have heard Mr. Flinn say that from 1961 on there was just no increase in price. That is an argument against the continuation of the period from 1961 to 1968. You have the problem of going beyond 1957. I think the short answer is this: that were it not for the class actions that we instituted the whole question of fraudulent concealment would not even be in this case because fraudulent concealment takes you back but not forward. Fortunately we got in at the appropriate time as to the fraudulent concealment, as our memorandum pointed out at page 20. The Supreme Court in its opinion explicitly stated that Grinnell acquired ADT in 1953. Now, the ownership of the alarm companies by Grinnell was a matter of public record. The acquisition of competitors alarm company defendants were matters of public knowledge. As a matter of fact, ADT in one instance asked the Department of Justice for permission to acquire a particular competitor and that was not only a matter of public knowledge. It is mentioned in the Supreme Court opinion. Their rates, the MBR, were published. All of these are factors which go to demonstrate that it would be extremely difficult, if not impossible, to prove the fraudulent concealment.

I would point out that when you go to settle these cases, your Honor, and this is true in all the class actions since the electrical cases, that a norm has been established by the defense, and the plaintiffs' bar and that norm has been that it is four years prior to the time when the government action began.

7 I don't know a single case where there was ever any serious discussion of settlement on the basis of anything other than that except in two. One was the copper case where you had a six-year period and this is the other case and this is the longest by far, 11-1/4 years, and I know of no case, your Honor, and I defy anyone to point it out where there was serious discussion of settlement in which there was used treble damages as a basis for calculation. It just isn't done.

THE COURT: Mr. Kronfeld raises the problem and Mr. Lerner and Mr. Calafiura that you haven't indicated that you had any conception of what the potential damages would be.

MR. BERGER: Yes, we did. We had that and we worked on that. The first thing we did was to get all of the transaction data. Now, your Honor, we could have stuck to the four-year period and had some $260,000,000 of purchases. Mr. Lerner is way out on his figures. I'm sorry to say his arithmetic in particular is wrong. We started with the concept that we were going to take the longest period of time that would be rational in this case, which would be from April, 1957, to July of 1968. That would give us 11-1/4 years. We wanted that because we recognized the utter complexity of this case. Some other points were mentioned by Mr. McInerney yesterday. In our minds we wanted to cover as many across the board by way of a settlement and we wanted to see what figure we could come out with which would result in a respectable return and we found the figures to be $300,000,000 in purchases.

Now, we took the $800,000,000 in purchases and we excluded from that the $50,000,000 which we didn't represent. We explicitly carved out the individual plaintiffs who had brought their cases in Perry Goldberg's three states, so that left us with $750,000,000. We knew from our past experience that one hundred per cent of the potential class does not come in. It doesn't come in for many reasons. We also knew that we were going to insist upon the kind of notice here which would encourage participation and we knew that we would try by virtue of the direct mail for which the defendants paid to got direct notice to as many of the past subscribers as possible, and that turned out to be 89,000.

Now, we estimated that in number and amounts there would be between 20 per cent and 40 per cent who would come in. How did we do that? We did that, Mr. Montague and I, on the basis of our expertise in these cases. I have been working on them for ten years at least and he has been with me for nine years. We have been very intimately connected with matters of class actions not only in antitrust but in other cases. We have gone into the question of notice in this kind of case and we estimated that the maximum response here would be 40 per cent. As it turned out, the maximum was just a little below that and, your Honor, as arithmetic demonstrated yesterday, when you exclude the excise tax, which is an 8 per cent factor, you come down to roughly around $260,000,000.

Now, this means that this settlement as we estimate it would be somewhere around 3 per cent for an 11-1/ year period which adjusted for a four-year period would give us a figure of between 9 and 11 per cent.

We compared that with plumbing. In plumbing, your Honor, here is what happened: there you have a four-year settlement and it was explicitly stated to everybody involved that the damages claimed were for the period from 1956 through 1966, a 10-year period, yet the settlement covered claims only for a 4-year period. That was explicitly known to everybody in the plumbing case and

Judge Harvey approved that.

Now, in this case we are allowing everyone of the claimants to come in for the entire 11-year period, sir, and we are settling for the 11-year period, but you can only prove your claims for a 4-year period, so we allow them to come in.

We compared the returns in these other cases like Concrete Pipe's 4-year period was 7.1; Bakery Products' 4-year period was 15. We have plumbing, which is about 12 per cent for the 4-year period. We have Library Books which is 9 per cent in a 4-year period and we concluded that this was indeed comparable and in view of the complexities of the case a very substantial contribution to the administration of justice. That is how we reached it and we did evaluate the hazards of litigation.

I am not going to repeat what I said yesterday. I know your Honor is very clear on those points, but when we take into account that someone as keen in this case as the leading competitor's counsel, Mr. Shapiro -- his affidavit shows that he is presently of theopinion and he was and still is that the only people who can show damages were the competitors and yesterday I talked to Harold Cohn, who also had a competitor's case, your Honor, in Philadelphia when I first started this case. He refreshed my recollection yesterday.

Harold Cohen pointed out to me that I had a very, very difficult case because he had just finished the Sentinal case in Philadelphia and he was aware of the depositions that had been taken, all of which showed that the defendants with Sentinal were engaged in cutthroat price-cutting to drive the competitors out of business, the natural economic consequence of which would be to benefit the subscribers who got this.

As a matter of fact, Judge Wyzanski pointed out in his opinion in holding that this was a monopoly that in over 20 of the cities where they didn't have competition at all, your Honor, that the defendants lost money and he used that as a reason for upholding the monopoly, and I would point this out to your Honor because it shows the complexity of this case and its distinction from the others which were pure price-fixing cases and this is a monopoly case.

Let's assume that Judge Wyzansky's view was correct and that your Honor or any other judge trying these cases, if they have to be tried, would adhere to that view. That may not help us. It may indeed present a very substantial obstacle to the successful conclusion of this case.

So that we came to the conclusion you don't need any economist. That is not the way to settle these cases. The economist usually is used, your Honor, when you are trying the case and the economist comes in and he supports your preconceived notion as to what damages you are trying to demonstrate to get to the jury. That is what the economist is for. Mr. Montague and I based this conclusion on our intimate study of the case, the weaknesses, the strengths of the case, and I think that we must have had some strength in our case because these defendants are represented by eminent counsel who are certainly not going to pay $10,000,000 for noting, so that we have achieved a settlement in this extremely complex case which gives a return and, incidentally, Mr. Kronfeld's own economist says that the overcharge was somewhere between 3 and 6 per cent. We are not that far off, even assuming that his economist would testify to that. But what we do say is that it is not relevant to triple and it is not relevant to go back to 1947. You just don't settle cases that way, your Honor. They have never been settled that way and they aren't going to be settled that way.

I think with respect to the settlement, the record is clear that this is a very substantial settlement. The method by which we have planned the allocation of the settlement is the fairest that could be conceived which provides the greatest benefit to the greatest number of people at minimum cost.

Now, with respect to Mr. Kronfeld's desire for an additional hearing, an evidentiary hearing, I would only point out, which I did in our papers, your Honor, that Judge Wyatt recently turned down a request very similar to that in the antibiotics case, and Judge Harvey also turned down a similar request, pointing out that "In light of the arguments and this Court's knowledge of the proceedings that there was a sufficient record for determination of the issues here."

I feel that the case recited in our memorandum in opposition to Mr. Kronfeld is very pertinent here and that is from the Fifth Circuit, Young vs. Katz. Now, in that case the Fifth Circuit sustained a dismissal of objections to the settlement because the objectors dealt only with suggested possibilities supported by no real prospect of ultimate success, and the Court pointed out that there they merely offered numerous motions designed to thwart the settlement and prolong the litigation. I think that is exactly what the situation is here. I do not say that objectors, even if we don't go as far as the Wainwright and Crabba case which we cite and which the District Court says that the objector does not have a standing to come in in this way, but for someone to come in at this late date, having done nothing over the past years, and to come in and simply cp

that, "We have an economist and he is going to come in and he is going to say the following; he is going to assume that there has been damage to thousands of people all over the United States; he is going to assume that you can go back to 1947 and on that basis in tripling everything we are going to come to an astronomical figure" -- I don't think that is the kind of showing that is a minimum required for an objector, assuming your Honor is going to give him that standing which would warrant doing anything more than what your Honor has done up to here, and I respectfully submit that the record is clear that this settlement is fair, reasonable and an excellent one.

THE COURT: Let me ask you, did you ever take into consideration the financial condition of the defendants?

MR. BERGER: Yes, sir, we did.

THE COURT: What was that?

MR. BERGER: Well, some of the defendants are having cash problems and we took that into consideration in terms of spreading the payments, as your Honor knows, under a schedule which would begin after finality of the approval of the settlement.

THE COURT: I know there was a five-year payout, so to speak.

MR. BERGER: But in doing that we reviewed their financial statements and concluded that they are sufficiently sound to warrant this.

THE COURT: My question goes the other way: whether they are sufficiently sound to up the $10,000,000.

MR. BERGER: On the other hand, they are not sufficiently sound -- let me say this: I am convinced that the $10,000,000 figure is the highest figure that could be obtained and in reality the figure that we had originally, which Mr. Montague and I worked out on the basis of all of the figures that we had was $7,000,000. That was the figure that we felt that we could come in and say to your Honor based on other cases could be supported. But in our negotiations we got $10,000,000, and that is the figure which we think is an excellent figure and we have reason to believe that the figure that the defendants had in mind was substantially below 10,000,000, but we refused to accept it, and the $10,000,000, considering their financial condition, is, in my judgment, an excellent result.

THE COURT: Mr. McInerney, do you want to close up?

MR. McINERNEY: Very briefly, your Honor. I would like to note for the record that the affidavit of service for our brief that we filed yesterday shows that it was served on 184 attorneys and firms who have entered cp

appearances in this matter; that yesterday by our count, excluding the defense counsel, there were 65 attorneys present in the courtroom. There were 30 notices of appearance entered yesterday, some of which were by defense counsel. The former figure of 65 excluded defense counsel. Only three objectors have been heard.

Now, I submit that that is a further indication of the enthusiasm for the settlement that the majority of the alleged class and their counsel have.

In his argument Mr. Kronfeld mentioned one or two things which I would just like to take up very briefly. He contended that it was improper for this Court to consider the weakness of the claim to a class action as part of consideration of settlement. I submit it is patently proper for the Court to consider any obstacle that may stand between these claimants and a money judgment at the end of the road years from now, perhaps, and very problematically, and therefore it is proper to consider the weakness of the class claimants.

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It is proper to consider other matters that we have raised, one that I didn't mention before at any length but that Mr. Kronfeld has taken up. He says the statute of limitations issue is at rest here. Well, I don't think he has read our brief or maybe he overlooked the footnote on page 13 of the current brief which refers back to the class action brief at page 49 to page 52 in which we argue that if the Court were to sustain this class action and allow people such as Mr. Kronfeld represents to come in years after the statute has expired, that interpretation of Rule 23 under these circumstances would be an interpretation which would permit that court-made rule to amend the Clayton Act and we submit that the Court cannot amend the statute of limitations that Congress has enacted.

THE COURT: Didn't our Second Circuit already do that?

MR. McINERNEY: In the context of an antitrust case we have one authority which we have cited to you where at least one court has indicated that it would uphold the position we take. I don't mean to argue the merits of that at this moment. I simply wish to point out Mr. Kronfeld's mistaken idea that all issues of the statute of limitations are at rest and simply wish to point out that Mr. Kronfeld is wrong again when he says that.

In addition to the case Mr. Barger has cited there are other cases cited in our prior brief and current brief in support of the motion to quash the subpoena and further that no evidentiary hearing is required under the circumstances.

Your Honor, the indisputable documentary evidence and affidavits that have not been contested and a complete record of the trial in the government case, the documents on file in the depository and all of these other sources that were available to Mr. Kronfeld, with all that he has been unable to pick up a single item of evidence that would in any way impugn the position that we take on this settlement, and for all of those reasons I respectfully submit that the settlement should be approved as fair and reasonable without any need for any further hearings on the matter and without further delay. Thank you.

THE COURT: I come back to this question of financial ability. Is there any discussion along those lines on fiancial ability? It seems to me that in these class actions the Court in essence is running an equity receivership because if you will go to the judgment your defendants file in bankruptcy.

MR. JOSLYN: May I be heard on that question?

THE COURT: I haven't finished talking.

MR.JOSLYN: Excuse me.

THE COURT: And so there is a balancing here that has to go on. I may be wrong, but I think one of the reasons -- and I dont see it discussed in the cases -- the reason you have settlements is thatpeople are realistic, aside from all the other risks of litigation, the point being what good is a judgment which becomes a general claim in a bankruptcy and consequently this is an area, I assume, of discussion and certainly of weighing by counsel in arriving at the figure as to whether you want to settle or whether you want to proceed, because, Mr. Kronfeld, if you are the counsel who were to carry on this case to trial through 14,000 hearings, what good is it to you if the Court gives you a hundred million dollar judgment or even a one million dollar judgment? You are not going to collect it and it won't be there. So, this is a very practical situation that is faced by counsel I think in coming to the discussion of settlement in these cases. You didn't even mention it.

MR. KRONFELD: I certainly have not. Nobody else mentioned it. They didn't have the temerity to mention it.

THE COURT: I assume that it is inherent in the settlement being a five-year payout?

MR. BERGER: That is right.

MR. HOLMAN: I represent the defendant Holmes Electric Protective Company. I would like to address myself to the question of the size of the defendants and their ability to pay some of their astronomical figures that Mr. Kronfeld comes up with. Mr. Berger and I had some weeks of very hard, very difficult negotiations just on the point of this. Holmes was not able, and we told Mr. Berger that Holmes was not able to participate in the settlement if the figures went beyond what we are talking about here. The protection service industry, your Honor, and the companies in it are not large companies. The defendant Holmes, for instance, our client, was at the time of the government suit held to be the second largest company in this business in the nation, yet in 1950 Grinnell purchased Holmes from the New York Telephone Company lock, stock and barrel, one hundred per cent, for $4,250,000. That is less than half of the settlement here. Holmes' share of this settlement, which was argued out at great length and very carefully at arm's-length between all of the parties here, is 9 per cent. Our 9 per cent share here amounts to one full year's earnings from all sources, not just the accredited central station protective business.

Judge Wyzansky in his opinion in the government case here specifically recognized that the companies here were not large companies. He said that they were small companies. He said their conduct was not "corrupt." He said their conduct was not "imperial." He said, "This is not a big case in any sense," and he said that what he was doing was "rooting out by his judgment a plant of minor importance."

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Now, the divestiture order, we submit, did that. We have been litigating here since 1960, about 12 years. How many times do we have to go through this case again? The burden of continuing this litigation on a company of our size is so severe that we are willing to make these payments, but there is a point beyond which we cannot go. There is a point at which the company's officials say: "If we are going to die we don't want to commit suicide in a settlement. We'll let someone kill us."

That is the point we are at. $10,000,000 is twice the worth of this company in an arm's-length negotiation when it was purchased and I believe the proportion of the earnings that I have expressed for Holmes in this settlement is that of some of the other companies here as well.

10 THE COURT: All right.

MR. KRONFELD: Your Honor --

THE COURT: No, Mr. Kronfeld, one time at bat. You don't end up. You are not the movant, you are the objectant, so you come in between openings and rebuttal.

MR. SONDERICKER: Your Honor, we appear for the Automatic Fire Alarm Company of Delaware. I am just backing up Mr. Holman who spoke for Holmes.

was no damage at all in the three cities here, two of the three, New York and Philadelphia, which seem to be the places where the most objections are coming from.

Thank you, your Honor.

THE COURT: Anybody else? That takes care of AFA, ADT, Holmes and Guinnall.

Thank you very much.

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MR. SONDERICKER: I'm not so sure on that. I think Mr. Flinn can speak better than I because he has better figures.

THE COURT: How much is involved in the other 50 cases that maybe left, or 45?

MR. FLINN: Approximately $50,000,000, your Honor.

THE COURT: $50,000,000?

MR. FLINN: That doesn't include the United States Government damage action.

THE COURT: They only get single damages.

MR. FLINN: That is right, only single damages.

MR. SONDERICKER: One final point, your Honor. The objectants here today are primarily from New York and Philadelphia. My client tells me that they operate only in Boston, Philadelphia and New York. My client tells me that what Mr. Cohn told Mr. Berger is absolutely correct: that in those three cities there has been a hard, cutthroat type competition throughout this period. If you look at Mr. Thomason's affidavit -- Mr. Thomason is the president of our company who has been with the company for 30 years and may be as knowleigeable as anybody in the business as to these cases submitted an affidavit in support of the settlement and in paragraph 17 there you will see a reference to the company called Fruchter in Philadelphia, which was taken at random because it just happened to be in the office at the time, and that company was receiving a rate of $666.25 throughout the period 1954 to 1972 for central services stations in Philadelphia and never received one increase. This was just an example of what was going on, my client tells me, in these cities, Boston, Philadelphia and New York throughout the period. So, far from being a case where there has been a steady increase in prices from 1954 to 1971 and 1972, that is not the case at all.

If I might add this finally: since the decree by Judge Wyzansky in 1967, if anything there has been no break-off in prices, which is one measure of damages with which your Honor is so familiar in this type case. In fact, there has been a flattening out of the charges and no dramatic break-off in the price as a result of the supposed end of the conspiracy with the judgment entered into that year. In fact, there has been no break-off in 1961 when the enforcement action was entered, nor was there any in 1967, so that you have had a flat price curve throughout the period, and I say that this is one example of the fact that there was not an overcharge of the kind that the plaintiffs here are claiming, and my client would be prepared to say if this case is to go to trial, that there was no damage at all in the three cities here, two of the three, New York and Philadelphia, which seem to be the places where the most objections are coming from.

Thank you, your Honor.

THE COURT: Anybody else? That takes care of AFA, ADT, Holmes and Grinnell.

Thank you very much.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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City of Detroit, et al., :

Plaintiffs, : 68 Civ. 4026

v. :

GRINNELL CORPORATION, et al., :

Defendants. :

- x

June 5, 1972,
10 A.M.

Before:

Hon. Charles M. Metzner,
District Judge.

APPEARANCES:

David Berger, Esq.,
Attorney for class representatives, plaintiffs,
By: David Berger, Esq., and
H. Laddie Montague, Jr., Esq., of Counsel.

Paul Weiss Rifkind Wharton & Garrison, Esqs.,
Attorneys for claimants General Motors Corporation et al. and Ford Motor Co., et al.,
By: Simon H. Rifkind, Esq., and
Max Gitter, Esq., of Counsel.

Howrey Simon Baker & Murchison, Esqs.,
Attorneys for Bay Shore Shopping Center, et al.,
By: William Simon, Esq., of Counsel.

Lord Day & Lord, Esqs.,
Attorneys for David Berger,
By: Herbert Brownell, Esq., and
Gordon B. Spivack, Esq., of Counsel.

Olwine Connelly Chase O'Donnell & Weyher, Esqs.,
Attorneys for AFA,
By: William F. Sondericker, Esq., and
Joseph M. Burke, Esq., of Counsel.

Donovan Leisure Newton & Irvine, Esqs.,
Attorneys for American Cyanamid and Shulton Inc.,
By Samuel W. Murphy, Jr., Esq., and
Thomas F. Munno, Esq., of Counsel.

Thomas B. Leary, Esq.,
Legal Staff, General Motors Corporation.

Botein Hays Sklar & Herzberg, Esqs.,
Attorneys for Hart Schaffner & Marx and subsidiaries.
By: Nathaniel Whitehorn, Esq., of Counsel.

Wald Harkrader & Ross, Esqs.,
Attorneys for Wald, Harkrader & Ross,
By: Joel E. Hoffman, Esq., of Counsel.

Weil, Gotshal & Manges, Esqs.,
Attorneys for Troika,
By: Jane R. Levine, Esq., of Counsel.

Cahill Gordon Reindel & Ohl, Esqs.,
Attorneys for Grinnell Corporation,
By: Denis McInerney, Esq.,
Thomas F. Curnin, Esq., and
Allan S. Joslyn, Esq., of Counsel.

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that I am in court here to save some money.

As a matter of fact, your Honor may have noticed that Ford and General Motors have clubbed together to hire one lawyer. It must be for the purpose of saving some money. So I don't want to apologize for that.

And having said that I do not need to apologize, I think this is a goodtime for me to subside.

THE COURT: I do not have a copy of your brief.

MR. RIFKIND: We have served it and filed it.

THE COURT: You have about covered the waterfront on the position of those who oppose it.

Is there anyone else who wishes to talk? Would you please limit yourself to new matter.

MR. SIMON: If the Court please, my name is William Simon. I represent Bay Shore Shopping Center, Francis Wood Development Company, Garden State Plastic Corporation, Humble Oil Refining Company, International Lubricant Corporation and Shell Oil Company. And while I appear here as Mr. Berger's adversary in opposing his application for fees, I should say I am also his ally in equally opposing those who would ask for a slice of his fee on the ground that they contributed something to what he undertook to do here.

I have two preliminary matters, Judge Metzner. First, I filed a motion for an evidentiary hearing which at the last hearing your Honor took under advisement. I don't know whether you want to rule on it now.

THE COURT: No, I do not.

MR. SIMON: But I do not want to be in a position of having waived.

THE COURT: You haven't waived.

MR. SIMON: I want to call your attention to the last hearing in which your Honor said at this hearing--

THE COURT: Mr. Simon, pardon me, we have been going now for over an hour and a half. Just limit yourself to matters not covered by Judge Rifkind.

MR. SIMON: This was not covered by Judge Rifkind.

THE COURT: I know everything that happened last week. I have a memorandum of it. Would you please proceed on your opposition?

MR. SIMON: I would like now to offer evidence--

THE COURT: I ruled on that last week. I said I would hold it in abeyance. Now proceed.

MR. SIMON: I would like the record to be clear that I am asking for that --

THE COURT: I know, you asked for it in the record last week.

MR. SIMON: Very well. I would concede Mr. Berger is entitled to a reasonable fee. And the issue is what is

THE COURT: Anybody else?

MR. SONDERICKER: Your Honor, my name is William Sondericker from the firm of Olwine, Connelly, Chase, O'Donnell & Weyher. We represent one of the defendants.

I am constrained, your Honor, to also join in the opposition. I think it is understandable when one looks at my clients. Their annual report, which I have here, indicates that their annual net income for the year 1970 was $292,803 and for the year 1971, $360,999.

I personally would be troubled by any award over ten percent in view of everything that happened.

However, I say, in any event, that the primary reason in my mind for this settlement is Mr. David Berger and the reputation he bears from my personal experience and opposition to him in the electrical cases in Philadelphia a good many years ago.

And I am also impressed by the fact he said to your Honor just the other day that the defendants in effect left $3 million on the table. This is regrettable for me because I wished we had settled for $7 million instead of $10 million.

So with all those things taken into account, I think still the application is excessive.

My client feels that way very strongly.

However, on the other hand, I cannot undo the fact that Mr. Berger and this firm are very very able and experienced in this field and they are certainly worth a lot. There is no doubt about that.

I also feel that I am constrained to put on the record my opposition here and that of my client to any sharing of Mr. Berger's fees for what he has accomplished with those individuals that brought their own cases. They made their deals with their lawyers before the case was started and I think just as a matter of public policy is a threat, settlements of this kind, to have the idea that after a class action is instituted counsel from other clients will come in and make applications to share in that fee.

I think it has a very chilling effect - it has on my mind certainly - if I thought in every class action in which our firm represented a defendant we might be confronted with this. I think it would have the tendency --

THE COURT: You know of that problem at the time the national class action is instituted, or at the time your national class action comes up for settlement. You know those plaintiffs who have instituted separate suits.

MR. SONDERICKER: That's true, but I think -- all I am saying is, your Honor, that if the individuals who have instituted separate suits are to join in the application for fee allowance for the plaintiffs' attorney in the class action, it in my mind would tend to raise the amount of fee that is necessary to compensate all the lawyers.

THE COURT: This is one of the problems the Court has to face up to.

MR. SONDERICKER: Yes, your Honor. Thank you.

THE COURT: All right. Anybody else?

Now we have the last matter which is the application by the troika to participate in Mr. Berger's fee.

Who will speak on that?

MR. ROBINSON: I will, your Honor.

May it please the Court, my name is Herbert Robinson. I am a partner in the firm of Udall, Robinson & Pearlman. I am one of the three members of the troika and I speak for the troika at this point.

In the first instance, we believe that I should advise the Court that we held a meeting with Mr. Berger and counsel for him on May 25, 1972, at Mr. Berger's request in an effort to resolve our differences. We were not successful on either side.

My immediate reaction on reading the initial settlement papers here was that the proposed fee of 25 percent on a $10 million base was excessive. My conclusion was based upon my experience in other class litigation.

I know the rule of thumb and the rule of law that the percentage decreases as the amount increases. And we have cited the relevant authorities at page 17 of our memorandum of law.

We think Mr. Berger's services were very creditable. We think he is justified in requesting a fair award. We do not think $2.5 million is a fair award. It gives undue credit to him for the very valuable services that he rendered. And we took that position before we filed any papers with this Court because on March 22, 1972 we telephoned Mr. Berger's office. I understood that he was out of the country at that time. And we informed him both of our opposition to the amount of the fee as well as our intention to apply for participation within the fee.

Now, that was before we knew that the distribution for the class claimants would be only in the neighborhood of 3.5 percent.

I had made my own mathematical calculation as to the rate of compensation, but one of the gentlemen preceding me went through it, and so I won't go into it now.

A charge of avarice is made in one of Mr. Berger's papers against us. In the light of the kind of rates of compensation that he seeks I think it is somewhat inappropriate for him to say that.

Now, in the light of the following four considerations - one, the comparatively limited nature of petitioner's services; two, his use of our services as an aid, as a base for his ultimately successful settlement and as a launching platform from which he could conduct negotiations; three, the minimal distribution available for claimants; and, four, the equity rule previously referred to - we submit that the requested fee is excessive and should be reduced substantially.

Now, we submit further that the troika is entitled to share in whatever fee is awarded. Mr. Berger's papers state that we are only liaison counsel and only did administrative work. First and foremost, it is clear from the discussions at the hearings before your Honor that we are lead counsel - we were so designated, we have so functioned, we have functioned in that capacity together with Mr. Berger. He has been aware of this fact throughout. And it was never within Mr. Berger's province to unilaterally determine that he could go it alone and could ignore the troika.

All of the plaintiffs, including the class action plaintiffs, were joined together under the lead of the troika. We were entrusted with responsibility by the subscriber plaintiffs and by the court.

His people, the attorneys in his office, attended a number of meetings with us. There was never any objection, they never objected when the questions were raised informally about ultimate compensation to the troika. In fact, he even recognized some participation by the troika because, as he states in his papers, he made some payment on account for out-of-pocket expenditures.

I don't think any of us have ever billed for all the out-of-pocket expenses. The fact is that his firm looked to us for specific assistance at various times. It looked to us for general assistance of practically all kinds. And he also assisted us, he did some work in cooperation with us prior to the settlement negotiations. We never denied that, and we cooperated with him throughout. But we have the lead, not his firm.

As lead counsel we have responsibilities extending far beyond administrative detail. And I don't want to minimize the importance of the administrative detail, whereas here we have such a large number of subscriber-plaintiffs. It was important throughout; it imposed extra burdens upon the troika.

When you were informed that the troika had been selected, your Honor commented that you thought -- "I think it is a good idea, actually. It is starting out as a complicated, involved litigation and I don't see how one law firm can possibly carry the burden" -- and you went on to say that you accepted the proposal of the troika.

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Subsequently, Parker, Shiffman & Flattau were appointed to make the determination for the Court.

Our position as lead counsel contained obligations and substantive legal burdens - I say substantive, not substantial, although what was involved here was over and above our duties to our individual clients.

It contained a measure of fiduciary obligations to all of the plaintiffs which, of course, we have to weigh in the balance with our responsibility to our individual clients. And we faithfully fulfilled those duties to everyone. We did so to Mr. Berger's clients, we did so to our own. We favored no one, we helped all.

It meant extra conferences, additional papers to review, and not the least additional views and papers to correlate.

We had to reconcile conflicting views among counsel, we had to re-do work we had previously done ourselves for our own clients, we had to yield on points, we had to include points, we had to exclude points, we had to adjust varied formulations even where our general views coincided.

And, your Honor, among lawyers such adjustments can be and they were very complicated.

As Mr. McInerney commented on May 24th before your Honor, there was " a virtually unprecedented number of individual cases in this litigation."

This was further complicated by the existence of two groups of plaintiffs at the inception - the subscribers and the competitors.

On the statute of limitations issue we accepted the pressure of the competitors to have one of their people - Joel Hoffman, Esq. - to take the lead in opposing defendants' motion for partial summary judgment.

Now, Mr. Hoffman did a fine job. We acknowledged that substantial creditors bill him for his services, and his achievements also, and we have no objection in principle to his participation in any fee award herein. However, we do say that we worked closely with him at all times, at all stages. WE all cooperated.

And we would also note that whatever allowance made to him should be weighed in the light of the fact that his participation was primarily in the statute of limitations area, was not as extensive in the general discovery problems, and that it terminated following the Court of Appeals decision.

Mr. Berger in his argument before the Court on May 25th, in responding to Mr. Kronfeld, said "We have had, contrary to what Mr. Kronfeld has said, interrogatories answered in depth. We have had documents by the thousands and we have analyzed them."

Your Honor, we were the ones who handled the interrogatories. We were the ones who pursued the defendants when we did not think that appropriate responses were forthcoming. We negotiated the revisions of the demand for interrogatories and held Rule 9 conferences. We were the ones that followed up and saw that the documents were produced. We were the ones who did the work.

Mr. Berger's participation in that aspect of the case was minimal indeed.

Again he states at page 91 that the transaction data was produced pursuant to our joint transactions. We have a letter here from Mr. Flinn in 1970 in which he states that there has been placed in the repository, pursuant, I think, to interrogatory 22, a mass of transaction data, including tax reports, worksheets, summaries, et cetera.

We are also the ones who should secure the credit primarily for having produced that data - that data which necessarily had to utilize some kind of basis for the bargaining - else all of the strictures launched against Mr. Berger's application here must be taken as true, because then he could not have had any kind of significant basis for determining what in his opinion was a fair settlement amount.

In the Lindy case the Eastern District recognized that the City of New York, which had handled work on its own, was entitled to a reduction of the fee that was charged there. That is not different in principle from what we are seeking because we, too, contributed to the job. We, as one of the courts stated, lightened the burden that Mr. Berger had. And there simply can be no doubt -- I believe your Honor has personal knowledge of this from appearances before your Honor -- but the record here shows that we carried the laboring oar throughout all of these years of protracted discovery proceedings.

Had we not done our best to push the litigation, had we not pursued the defendants when they were dilatory in complying with discovery demands, we believe that there would not have been a settlement at this time and in the amount that is now presented before your Honor.

Now, another charge is made by Mr. Berger. He states that we were hostile to the class and that we considered the class action a stumbling block. Well, I think somewhat innocently, but, nevertheless, in fact he distorts the phrase that apparently was used by some lawyer on behalf of the plaintiffs.

We all knew that a day of reckoning would approach if there were to be settlements of these cases instead of trials. Of course, in that situation the class action was a stumbling block. The defendants had to know what their exposure was with respect to the class actions. They had to put some kind of ceiling to it.

Any reference to stumbling block was surely not done in hostile terms, but was done in terms of something that necessarily had been resolved before one could ever approach settlement of the individual actions, if that should ever be feasible.

The documents annexed to Mr. Berger's papers show how we cooperated. Apparently at one time someone failed to notify him of some meeting. But the same thing happened to others. I wasn't notified of one or two meetings. There may be some administrative default, but the fact is he is listed as the recipient of notice after notice and of document after document.

His voluminous reply papers were served on me at 5:25 p.m. on the evening of May 23rd, before the return date of this proceeding in this court on May 24th.

t 19 When I read those papers I was amazed. I had stated in my moving affidavit that I had given certain assistance to his firm.

There was a further statement with respect to the copying of the complaint from the Port of New York Authority. Mr. Berger's papers are certainly silent with respect to that. Yet, I show that, one, I was the one who apparently first brought the knowledge of this litigation to his firm's attention in correspondence between Mr. Neuberger and myself. Mr. Neuberger wrote and asked me for a copy of our complaint. I immediately responded. I sent him a copy of the Allied Stores complaint.

Subsequently, when Mr. Neuberger undertook responsibility to prepare the Rule 34 motion, he asked me for a copy of my Rule 34 motion. I sent it out immediately.

It is my recollection that I even filed papers for Mr. Berger's firm at one time. This does not show hostility; this reflects complete cooperation. And it seems to me that it would be most appropriate for Mr. Berger to acknowledge that instead of challenging the work that we did with him - and I have witnessed the fact that the other troika members also cooperated with him.

Our work in the words of the judge in the case of Philadelphia Electric Company against Anaconda-American Brass Company "considerably lightened the burden of petitioner."

In the present litigation the troika carried the major burden short of the class action proper. Other subscriber plaintiffs have recognized that.

Unsolicited affidavits from the Botein firm and from the Wilke and Gould firms recognize that.

Judge Rifkind's memorandum points out that the work, I believe, of coordination, in their words, was conducted by our firm -- by the troika, I mean.

But it went far beyond coordination. It is precisely because of Mr. Berger's contribution to the class action proper that we do agree that he is entitled to the lion's share of the credit for it. It is for that very reason that we applied for participation in the fees that may be awarded inthe ratio of three for his firm as against one share for all three of the troika firms.

I do not think that is overreaching. I do not think that is excessive.

I should advert to some of the pragmatic problems involved. Just as it serves the interest of justice and it serves public policy to offer an inducement to attorneys to take on contingent matters in the antitrust field as well as other transactions, so under the procedures of the judicial panel on multidistrict litigation does it serve public policy and public interest to provide in some manner to reward lead counsel who are appointed pursuant to those procedures.

This was contemplated by all of the subscriber plaintiffs in my opinion. It obviously was contemplated by your Honor because in at least one hearing before your Honor there was some discussion of it. No agreement was ever reached. In fact, no one ever pushed particularly hard for it. No formula was ever developed, but pragmatically this offers a magnificent opportunity to provide for the troika --

THE COURT: I think that is something that the panel is going to have to face up to one of these days. They talked about it - and I attended meetings when they did - but they haven't done anything really to take care of it.

MR. ROBINSON: It seems to me Mr. Berger coming to this Court on the basis of seeking an award under the equity rule - which I support and do not challenge - should also acknowledge that we gave him some help. And I submit, your Honor, that in equity we are entitled to a participation, albeit a small one in proportion to Mr. Berger's with respect to the fees that are awarded, and that this provide a result that is appropriate for all attorneys who participate in the fees that come out of the class fund here. We, too,

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CITY OF DETROIT, et al.,

Plaintiffs,

-against-

68 Civ. 4026

GRINNELL CORPORATION, et al.,

Defendants.

---x

FILED
U.S. DISTRICT COURT
DEC 27 4 04 PM '77
S.D. OF N.Y.

MANHATTAN-WARD, INC., et al.,

Plaintiffs,

-against-

68 Civ. 4028

GRINNELL CORPORATION, et al.,

Defendants.

---x

1225 VINE STREET BUILDING, INC., et al.,

Plaintiffs,

-against-

68 Civ. 4027

GRINNELL CORPORATION, et al.,

Defendants.

---x

NOTE

Because the official Opinion (A574-A607) did not lend itself to high quality reproduction in this Appendix, for the Court's convenience a copy of the Opinion as reported in 5 CCH Trade Reg. Rptr. ¶ 74,341, has also been included immediately following, at A608-A617.

METZNER, District Judge:

The parties have moved for court approval of a proposed settlement of three national class actions and for a reasonable counsel fee in what has been known as the "central station protection service" litigation.

I. THE SETTLEMENT

In 1966 the Supreme Court affirmed a judgment in favor of the government in an action seeking relief for alleged violations of §§ 1 and 2 of the Sherman Act by Grinnell Corporation and three of its affiliates, American District Telegraph Company (ADT), Holmes Electric Protective Company (Holmes) and Automatic Fire Alarm Company of Delaware (AFA). 384 U.S. 563. The decree enjoined the defendants from violating the law and required divestiture by Grinnell of its affiliates. A final decree was entered by the district court on July 11, 1967.

As can easily be imagined, a slew of private actions were then instituted seeking treble damages from the four defendants. 68 such actions were filed in this court and all of them were assigned to me pursuant to Rule 2 of the General Rules of the Southern District of settled. 56 other subscriber actions are still pending. 3 of these are the national class actions with which we are now concerned.

The *Vine Street* action is brought on behalf of all owners and operators of retail stores, shopping centers, office buildings, apartment houses, hotels and motels, theatres and other amusement buildings and private institutions situated throughout the United States. The *Manhattan-Ward* action is brought on behalf of all owners and operators of industrial and commercial manufacturing plants situated throughout the United States. The *City of Detroit* action is brought on behalf of all state, county, and local government and public bodies, and public schools and school districts situated throughout the United States. By definition these national class actions would embrace the claims of all pending subscriber actions except 3 statewide class actions on behalf of governmental entities in those states which are excluded from the proposed settlement.

The proposed settlement is predicated upon an assumption that the actions are proper class actions. The parties had briefed and argued the class action issue and while the matter was *sub judice* the court was requested not to proceed with determination of the issue because the parties were engaged in settlement negotiations. The effect of the existence of this issue will be discussed later on in this opinion. The notice of settlement mailed to subscribers also included the material required by Fed. R. Civ. P. 23(c)(2) for exclusion and appearance by counsel.

The settlement offer contemplates the payment of $10,000,000 by the defendants to cover all 3 national class actions. Grinnell will contribute $3,850,000 toward the settlement in 3 installments through 1974. ADT will contribute $4,850,000 in 3 installments through 1974. Holmes will contribute $900,000 in 2 installments, payable on January 15, 1975 and January 15, 1976. AFA will contribute $400,000 payable in 2 installments on the same dates as Holmes. All deferred payments are to bear interest at 1% over the prime rate existing during the period.

The damage period covers 11-1/4 years from April 13, 1957 to July 11, 1968. The starting date is 4 years prior to the institution of the government enforcement action, which represents the usual statute of limitations period. Clayton Act § 4B.

Notice of this application was mailed to some

69,000 customers of defendants who had total billings of some $800,000,000 during the damage period. In addition, publication of the notice appeared for 3 consecutive weeks in both the Wall Street Journal (all regional editions) and the New York Times. 14,156 customers filed claims involving total billings of $330,525,000. $37,979,000 of these claims has been challenged either by the plaintiff or the defendants. In addition, the total billings included excise taxes of about $25,000,000.

The proposed settlement would thus afford a recovery of from 3.2% to 3.7% to customers who filed claims for the 11-1/4 year damage period. The exact percentage will depend on the resolution of the contested claims and whether or not the amount of excise taxes is included in the computation.

Rule 23(e) requires that a class action may be compromised only with the approval of the court. Approval should be given if the settlement is fair, reasonable and adequate. The settlement hearing should not be turned into a trial or a rehearsal of the trial. *Newman v. Stein*, 464 F.2d 689, 692 (2d Cir. 1972). The evaluation of the proposed settlement in this type of litigation against this standard requires an amalgam of delicate balancing, gross approximations and rough justice.

Saylor v. Lindsley, 456 F.2d 896, 904 (2d Cir. 1972).

In Protective Committee v. Anderson, 390 U.S. 414 (1968), the Court said at pages 424-25:

> "Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation."

The very purpose of a compromise is to avoid determination of sharply contested issues and to dispense with wasteful litigation. In re Prudence, 98 F.2d 559 (2d Cir. 1938). At the same time the court must weigh the relative advantages and disadvantages of the positions of the respective parties. In Florida Trailer & Equipment Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960), the court said:

> "But the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements."

In addition to considering the strength of the case for the plaintiffs against the amount offered in settlement, the court must weigh the judgment of counsel for plaintiffs, the extent of support from interested parties, and the presence or absence of good faith bargaining. *State of West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 741 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

Objections to the proposed settlement come from a very small number of claimants, only one of whom had previously filed an individual lawsuit. 150 of the 14,000 claimants were represented by attorneys in filing their claims, and only 5 of these attorneys object to the settlement. Their clients represent 1/2 of 1% of the billings for all claimants.

At the first pretrial conference called to coordinate the pretrial proceedings for all 84 cases, the court appointed a committee of 3 attorneys (the "Troika"), selected by counsel for all subscriber plaintiffs, to represent those plaintiffs in future proceedings. Such a committee was designed to afford greater efficiency in presenting or defending against motions and in the conduct of discovery. 2 of these 3 attorneys represent plaintiffs (some with multiple installations) who have joined the class as claimants and do not object to the settlement. They also represent other clients who have filed claims. 11 of the individual subscriber plaintiffs have filed claims in the proposed settlement. Only 36 of the individual plaintiffs have opted out and their cases remain pending in addition to the 3 statewide governmental class actions. I understand that these 39 cases represent $50,000,000 of billings. I point out these facts as an indication of the views of attorneys who have lived with this litigation for a number of years and are fully familiar with the discovery as it exists today.

That discovery is huge. It consists of everything that was produced in the government suit (documents, depositions, and transcript of the trial, as detailed in 236 F. Supp. at 247), documents produced and depositions of the defendants taken in the *Sentinel* case in the Eastern District of Pennsylvania (this was a subscriber case which was settled before trial), and the tremendous amount of information furnished to subscriber plaintiffs in the consolidated pretrial proceedings in this court. One interrogatory alone, propounded by the Troika, required 3,000 pages for its answer. All of the above material was placed in a depository originally leased at 205 Pearl Street in this city. The court personally visited those premises and observed the volume and organization of the material in some 260 filing drawers and open shelves.

The main objections to the settlement are voiced by a law firm in Philadelphia on behalf of 20 claimants who had total billings of $270,000 during the damage period. Parenthetically, counsel for the class plaintiffs is also from Philadelphia, where the national class actions and 3 other individual subscriber cases were originally filed. Objecting counsel admits that he has expertise in the field of antitrust litigation and that some of the claimants he represents are substantial businesses. 3-1/2 years after the statute of limitations has run this firm appears and projects an astronomical estimate of what is involved in this case. An example of this magnifying glass approach is found in counsel's reference to $800,000,000 in total billings for the 11-1/4 year damage period as a basis to be used in evaluating the proposed settlement. Claimants with only $330,000,000 in billings have shown an interest in filing claims, and it is this figure which must be considered as the maximum in evaluating the settlement.

Of course, the amount of damage with which we are concerned is not the total billings of $330,000,000 but only the portion of that figure attributable to the exercise of monopoly power or restraints of trade by defendants.

The objectors refer to what they call the net settlement figure in arguing the inadequacy of the offer. This completely ignores the obligation of the beneficiaries of the settlement to pay their share of the cost of the litigation which results in a recovery for them. Whatever the net may be, the fact is that the defendants are offering to pay $10,000,000, and this is the figure to be evaluated. The amount of counsel fees is for the court's determination and will be discussed later on in this opinion.

Objection is made to the failure of the attorneys for the class to obtain the services of an expert economist to aid in determining the potential damages. See Proposed Manual for Complex Litigation (Feb. 1972), ¶ 1.46. This objector has stated that he has consulted with an expert who is ready to testify that the provable damages after trial should run between 3% and 7% of total billings. It is not necessary to have an evidentiary hearing with this expert as a witness, since I consider that the proposed settlement of 3.2% to 3.7% is "well within the ball park" of this offer of proof. I should point out that the damage period here is 11-1/4 years, whereas in most of the other settlements achieved in class action antitrust cases, the period under the statute of limitations for such actions is 4 years. If the proposed settlement here is evaluated on a 4-year basis, the figure would fall between 9% and 11%.

Objectors proceed to enlarge on their 3-7% figure by saying that since this is an antitrust suit the figure should be trebled, which raises their economist's figure to 9-21%. In settling these cases, negotiations are usually conducted on a single damage basis. One of the reasons for this is that defendants are not admitting the type of wrongdoing contemplated in a final judgment after trial. This is somewhat akin to the consent judgment in a government enforcement action, with its usual "without admitting the truth thereof" clause. It facilitates the disposition of the litigation.

One of the objectors points to the so-called O'Brien memorandum in urging this court to refuse to approve the settlement. Frankly, it does not have the impact of the famous Raskob report which gave life to the government enforcement action against du Pont and General Motors. United States v. du Pont & Co., 353 U.S. 586, 600-02 (1957); Gottesman v. General Motors Corp., 279 F. Supp. 361, 365 (S.D.N.Y. 1967). The O'Brien memo must be read in context and does not bring the plaintiffs to a simple assessment of damages, as hoped for. It must be read in its entirety and then compared with the answering McDonald memorandums and the factual material produced in the pretrial proceedings.

The objectors also place a great deal of emphasis on what they claim is an issue of fraudulent concealment in this case. Of course, the existence of such a factor would have a distinct bearing on the time period to be embraced by any settlement.

While plaintiffs have alleged fraudulent concealment in their complaints, I doubt that such an allegation is ever absent in litigation of this type. It appears in the complaints of many of the individual subscriber plaintiffs in this litigation. No one has pressed it in those cases, where discovery begins with 1957.

The relationship between the defendants was public and common knowledge for a long time. The first private suit was filed in Philadelphia a year before the government even instituted its enforcement action. I find no substance to the objectors' claim that fraudulent concealment exists in this case.

It seems to me that the objectors have failed to fully use the depository to come up with a factual basis for their arguments. The first notice of this settlement went out in the middle of December 1971 and the hearing was held on May 24, 1972. The objectors claim they spent 4 days in the depository during that time, reading opinions, some depositions and some documents in the government case. To impress the court with the poor condition in which they found the depository, they refer to the fact that 10 drawers were locked and that the defendants refused to open them despite repeated requests. These drawers were locked because they contained documents under a protective court order in a case which had been settled in Pennsylvania and which had not been transferred here. In any event, there were 250 other drawers that could have been helpful.

I would again make special note of the huge amount of discovery in the subscriber cases, both in answers to interrogatories and document production. There is no indication that this material was reviewed by the objectors. The answers to interrogatories 18 and 19 furnish abundant information regarding the liability and damage issues in this litigation. I can only assume that the acquiescence in the settlement by counsel in 11 individual subscriber actions is based on the information they obtained from this discovery.

In any event, whether we are involved with a potential 3% to 7% or a 9% to 21% recovery, the hazards of litigation must be evaluated. To place the heaviest burden on the fairness of the proposal, the risks of litigation must be measured against the optimum recovery treble damages of 21% on an 11-year damage period.

It is true that the government judgment will be prima facie evidence in these cases, but it does not follow, as argued by some objectors, that this leaves open only the damage aspects of the litigation. The issue of relevant market is a close one. The dissents of the 3 justices in the government case were based on their disagreement with the majority on this issue. Justice Harlan was of the view that relevant product market was not sufficiently proved. Justices Fortas and Stewart were of the view that neither the relevant product market nor the geographical market was properly defined. Judge Wyzanski, who tried the original case and then conducted the hearings after remand by the Court, has said that if he had read Justice Fortas' dissent before he rendered his original determination, he would have followed the justice's reasoning because "it went to the heart of my error."

From my exposure to these cases, in the context of private litigation on behalf of competitors and subscribers, I find additional problems with which the Court was not faced. The definition of relevant market, both geographical and product line, may have been proper for the government enforcement suit on the theory of monopolization. It does not follow that it is proper for the private litigation with which we are concerned.

Secondly, liability in the government suit was predicated in the main on the existence of monopoly power. 384 U.S. at 566, 570, 584 and 586. Counsel for a number of competitor plaintiffs, who also represent subscriber plaintiffs not objecting to the settlement, have stated that in their opinion the only persons who suffered damages from the exercise of this power were the competitors. The evidence upon which they relied to settle their competitor cases showed that in cities in which defendants did not have any competition the rates charged were "normal" and "competitive," while in cities in which competition existed "defendants were charging cut-throat competitive rates in an attempt to force competitors out of business." Of course, the beneficiaries of this latter competition would be subscribers to defendants' services in such cities. Approximately 8,800 of the 14,156 subscribers who filed claims come from such cities. Most of the objectors also come from such cities. (Incidentally, Judge Wyzanski pointed out that even in cities in which there was no competition the defendants were not always able to charge their minimum basic rates. 236 F. Supp. at 324.)

The impact of these factors strongly favors the settlement. This is so even though the court is aware that the fact of damage, which is an element of liability, is satisfied by proof of some injury flowing from defendants' alleged illegal acts, and that "inquiry beyond this minimum point goes only to the amount of damage." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969); Trans World Airlines v. Hughes, 308 F. Supp. 679, 685 (S.D.N.Y. 1969).

Because of the disparity in charges between cities and the various competitive local factors, defendants are ready to contest each of the 14,156 claims on the amount of damages, even though liability may be proven. Assuming, for the moment, that the class action status is resolved in favor of plaintiffs, interesting trial problems are present, since the case is to be tried to a jury. Defendants' right to a jury determination of the damages for each asserted claim is not lost because this is a class action. While Rule 23 has been given broad application, no one suggests that it has repealed the Seventh Amendment. After appropriate discovery by the defendants has been obtained, and the litigation has not even reached that point yet, it is fair to assume a minimum of one hour for the presentation and defence of each claim. Thus, we can look forward to about 14,000 trial hours on the damage claims alone. With an average of 6 hours a day devoted to actually hearing testimony, the trial will take some 2,300 days or about 11 years. Assuming the greatest cooperation possible among advocates strongly prosecuting or defending a position, you might dispose of the matter within 5 years. I speak of strong advocacy on the part of the claimants because if there is anything less you may not assume a maximum recovery of 21%.

The questions of administration raised by such a trial are: Do you use the same jury to decide the entire damage issue? Does the same judge preside over this trial to the exclusion of his other more pressing work, such as criminal trials or applications for preliminary and permanent injunctions? Or is the judge relieved of all other assignments? Even if several judges and juries are used (including perhaps fragmentizing the proceedings into cities and their respective judicial districts), a huge amount of judicial time of any single judge and his court personnel would be devoted to the matter. Even though the defendants may ultimately be found liable to some or even all of the claimants, this demand on the existing judicial system must be evaluated in determining the reasonableness of the settlement. See *Protective Committee v. Anderson*, *supra*.

The across-the-board nature of the settlement might be objected to because some claimants will receive less than they are entitled to, as a percentage of actual damage suffered, while others will receive more. This is apparent from the disparity in charges and the actual competitive picture from city to city. As I stated above, most of the objectors to the settlement appear to be located in areas where competitor facilities existed. However, the formula adopted is the only realistic one to be considered in determining whether the settlement should be approved.

Another factor to be considered here is the financial ability of all or any of the defendants to satisfy the maximum amount which the objectors contend will be theirs if the litigation goes to judgment. The prospect of a bankrupt judgment debtor at the end of the road does not satisfy anyone involved in the use of class action procedures. I can understand that some installment payments under the proposed settlement may have implications other than an inability to pay. Under the proposed settlement, 87% of the recovery will be paid within 2 years. However, the 2 defendants with the smallest contributions, AFA and Holmes, will pay their $1,300,000 in 4 installments. It is clear that at least as to these 2 defendants the extended time for payment is attributable to financial inability.

Finally, we come to the issue of whether the actions may be maintained as class actions. I have referred above to the problem of relevant market. Obviously, any change in the definition of relevant market, either geographical or product line, after a trial of the issue of liability or as an issue in a separate trial, would seriously affect the determination of the existence of a national class action.

Assuming that the definition of the relevant market remains the same, it does not follow that a national class action may be maintained under the guidelines of Rule 23(a) and (b). The question of impact, essential to the determination of liability in a private damage suit, presents difficulties in the context of a national class action. There are differing competitive climates in each of the areas involved. All the members of a class did not contract for the same services, even in the same city.

Defendants properly point out that a large number of the individual subscriber actions, instituted prior to the bringing of these asserted class actions, involved total billings less than that claimed by the named plaintiffs in the class actions. Consequently, it would appear that as far as those plaintiffs are concerned the class action vehicle in this antitrust litigation is not necessary to adequately protect their rights. They cannot assume the self-anointed role of protector of the small claimant through use of class action procedures, with the pot of gold at the end of the rainbow for counsel. If these plaintiffs were successful at trial, they would be compensated with treble damages and an award of counsel fees charged against the defendants as an added cost of the litigation. Clayton Act § 4. There are separate rules for the determination of counsel fees after judgment in this type of case, and the fees are not tied to the amount of recovery. Trans World Airlines v. Hughes, 312 F. Supp. 478 (S.D.N.Y. 1970).

Finally, on the issue of class action status, I refer to the discussion above regarding the manageability of this litigation." What was said there is pertinent here.

These facts which bear on whether a class action is maintainable in this litigation show that the resolution of that question is neither easy nor free from doubt. The uncertainty as to resolution of the problem has substantial impact in determining the reasonableness of the settlement. The statute of limitations has long since run in this litigation. Denial of class action status would preclude recovery by any of the claimants because none of them can say that they relied on the existence of these actions for not having instituted a timely suit.

It is clear to this court, after reviewing all of the problems in this litigation, and following the established guidelines for evaluating offers of settlement, that $10,000,000 is a fair and reasonable settlement of the claims embraced in the 3 national class actions. The settlement is approved

II. COUNSEL FEES

We now address ourselves to counsel's application for a reasonable fee for his services rendered to the class action plaintiffs. Counsel has requested a flat 25% of the $10,000,000 settlement fund, or $2,500,000, as reasonable compensation for his efforts. Added to this would be the necessary disbursements incurred in the course of the litigation.

Opposition to this fee application has been voiced by a number of claimants who are satisfied with the settlement in addition to those who opposed it. The opposition was vehement and strenuous. A separate day had to be set aside for oral argument by the objectors to the fee application. At the outset, I must repeat what I have said numerous times in the past, and that is that a flat 25%-of-recovery formula is nonexistent as far as I am concerned. There are many factors to be considered in fixing the value of professional services in class actions instituted on a contingent fee basis. See Proposed Manual for Complex Litigation, supra, ¶ 1.47. These factors will be discussed as we review counsel's activities in these cases.

Counsel has detailed some 6200 hours spent on this litigation by senior and junior attorneys in his law firm and paraprofessionals. Such paraprofessional aid is gaining acceptance by the bar, and can reduce overhead expense in the operation of a law firm while increasing the quality of the services rendered. Brickman, Expansion of the Lawyering Process Through A New Delivery System, 71 Col. L. Rev. 1153 (1971). Hopefully, paraprofessionals might also reduce the cost of litigation to persons with valid claims who, even though not impecunious, cannot afford the fees for the effective advocacy necessary to successfully prosecute those claims.

Counsel estimates that a minimum of an additional 1000 hours will be necessary to complete the administration of the settlement. This will include the determination of challenges to some 700 claims and problems attendant to the ultimate distribution of the settlement fund.

Two comments have been made as to the number of hours reported. First, it is pointed out that half of the time spent is referrable to paraprofessionals. Second, "there is no delineation between time spent prior to reaching the settlement agreement and time spent after the signing of the order setting in motion the procedures for approving the settlement. These observations will be kept in mind in weighing the time factor in fixing the fee.

The weight to be given hours spent in arriving at a reasonable counsel fee in the contingent fee class action is less than that given in a Clayton Act § 4 situation. Cf. Trans World Airlines v. Hughes, 312 F. Supp.

470 (S.D.N.Y. 1970). However, it is still a factor, and counsel must be prepared to submit a record of the time spent in these cases. Fox v. Glickman Corp., 253 F. Supp. 1005 (S.D.N.Y. 1966). The court also considers that the existence of a contingent fee arrangement itself should be given appropriate consideration in fixing this fee.

I am mindful of Professor Hornstein's oft-quoted statement, constantly referred to by counsel for plaintiffs in class actions, that in a contingent fee case "One thousand plodding hours may be less productive than one imaginative, brilliant hour." Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards, 69 Harv. L. Rev. 658, 660 (1956). However, in applying that observation we must examine the benefit conferred on the class and determine whether it flows from counsel's skillful operation or plodding effort.

These class actions were instituted just 2 months before they would have lost the benefit of the tolling provisions of § 5(b) of the Clayton Act. For this, counsel deserves much credit. If the cases had not been filed when they were, the objectors to the fee and all other claimants would be receiving nothing or only a small percentage of what they will now receive. The damage period would have been limited to 4 years, commencing 3 years after the institution of the government suit. This obviously would affect the size of any settlement offer by defendants. In addition, the prima facie effect of the government decree would be affected. Cf. *Gottesman v. General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969). Plaintiffs have the advantage of a damage period of 11-1/4 years, going back to 4 years prior to the institution of the government suit.

None of the claimants can say that, but for these class actions, they would have instituted individual suits or class actions prior to September 1968 to protect their interests. This fact gains added significance when we recall that 55 individual subscriber actions were timely instituted, and some of the objectors here dwarf any of such plaintiffs in financial resources. On the other hand, the existence of this number of individual suits, many instituted more than a year prior to these class actions, somewhat diminishes credit to counsel for having the foresight to bring the suits.

In his fee application, counsel has detailed his work with regard to the prosecution of these claims. He states that he was a member of the Steering Committee for all plaintiff actions. This was an informal committee in operation prior to the assignment of all of the cases to me either pursuant to Rule 2 or § 1407. Subsequently, I gather that counsel worked with the Troika in the following areas: (a) drafting the motion for production of documents, (b) preparing the interrogatories submitted to defendants on behalf of all subscriber plaintiffs, and (c) resisting defendants' motion for partial summary judgment. He was involved in resisting the motion by AFA to dismiss all of the actions against it and was involved in the companion motion to substitute AFA of New York as a party defendant.

All of this activity was important. The production of documents and the answers to interrogatories are so necessary in antitrust litigation. The material here included much that was not included in the government discovery. The information furnished by the defendants obviously went a long way toward developing the basis for a settlement of the class actions. The partial summary judgment motion brought by the defendants, involving the tolling provisions of the Clayton Act, was bitterly fought by all plaintiffs. *Russ Togs, Inc. v. Grinnell Corp.*, 304 F. Supp. 279 (S.D.N.Y. 1969), *aff'd*, 426 F.2d 850 (2d Cir.), *cert. denied*, 400 U.S. 878 (1970). There then followed extensive briefing and oral argument as to whether those lawsuits would be granted class action status. While the matter was *sub judice*, the court was requested to withhold disposition pending the outcome of settlement negotiations.

With the submission of the proposed settlement, counsel (as a member of the Class Action Committee) undertook the supervision of the procedures set forth in Settlement Order No. 1. Following that order over 14,000 claims were filed and processed, corrections were sought and challenges entered. Finally, counsel has vigorously participated in the proceedings to approve the settlement.

Counsel has been an active participant in many of the class action antitrust suits filed in the last 5 years in the various district courts. 9 of these have been disposed of and 10 are still pending. There is no doubt that counsel has acquired, as a result of these experiences, an expertise in the handling of such matters.

Counsel seeks credit for some items of accomplishment which I find unjustified. For example, neither the extent of the dissemination of the notice nor the inclusion of the settlement terms therein should be given much weight. Certainly this court would never approve, under the facts of this case, any lesser notice than was given. Furthermore, notice of the settlement is required by Rule 23(c). Neither is the court persuaded that any weight should be given to the fact that counsel is not requesting fee participation in the interest to be paid by the defendants on the deferred payments. The installment payments are for the benefit of the defendants. The claimants are being deprived of the use of the money because of the installment procedure, and are entitled to interest as compensation for that loss.

I should also point out that the existence of the government investigation and the existence of a judgment available for use under § 5(a) of the Clayton Act are factors to be considered in determining the reasonableness of the fee.

This is a big case. $10,000,000 is not a small sum of money. The dollar amount of claims filed compared to total billings is high. It is true that class actions serve a useful purpose in protecting the individual whose claims might be so small as to not justify independent action. Such actions involve the undertaking of risks by counsel and justify the use of a percentage of recovery as one of the factors in evaluating the requested allowance of counsel fees. However, it would appear that the amount of risk involved does not increase tenfold simply because we are concerned with a $10,000,000 settlement instead of a $1,000,000 settlement. After a certain point is reached, the size of the counsel fee must be limited.

The court does not necessarily look to the fee a claimant individually would be willing to pay to recover his small share. These cases should be viewed from the adequacy of the fee to be received by counsel commensurate with the risks he has taken, the work he has done, the results he has obtained and the pro bono publico efforts involved in this type of litigation.

Under all the facts and circumstances which I have outlined above, I find that a fee of $1,500,000 is adequate in these 3 cases. The Proposed Manual for Complex Litigation, supra, states at page 43 that "Once adequate compensation sufficient to provide the motive for representation of classes is provided, no further incentive is required." I am sure that petitioning counsel will not be deterred from becoming involved in any future class actions because of the size of the fee allowed here. I am equally convinced that other attorneys will not be dissuaded from protecting the poor litigant in similar circumstances.

Petitioning counsel is also allowed $14,918.73 as out-of-pocket expenses to April 20, 1972. Requests for further reimbursement of expenses will be entertained only on an application setting forth categories and dates when the expenses were incurred.

An interesting question has been presented by the application of the members of the Troika and a fourth attorney to participate in whatever fee is allowed to counsel for the class action plaintiffs. In preparing for the first pretrial conference of counsel in all 84 cases, I sent a 2-page letter of proposed procedures to counsel, dated May 21, 1969. That letter contained a directive that counsel for all plaintiffs meet the day before the pretrial conference and select one of their number to be designated as lead counsel. Lead counsel is necessary for the efficient conduct of pretrial proceedings as envisaged by the coordinated proceedings under 28 U.S.C. § 1407. Such designation would have been required even if the court were only concerned with the 68 cases filed in this district.

At the pretrial conference held on June 17, 1969, the court was advised that counsel had decided that because of the huge number of plaintiffs' attorneys involved, the work of lead counsel should be distributed among 3 law firms rather than one. The recommendations for appointment were Mr. Millstein, of Weil, Gotshal and

Menges, Mr. Robinson, of Liebman, Bular, Robinson and Perlman, and Mr. Stein and Mr. Brett, of Parker, Chapin and Flattau. All of those designated were well versed in the intricacies of antitrust law and class action proceedings and members of distinguished law firms. The designations were formalized in Pretrial Order No. 1 dated July 2, 1969.

Those attorneys contend that a great deal of the benefit conferred on the class by the settlement flows directly from their efforts. It is their position that plaintiffs' counsel in the class actions should not receive more than 20% of the settlement as a fee and that they are entitled to 1/4 of that amount, or 1/4 of whatever amount the court ultimately grants. In addition, a claim for 10% of the fee awarded is requested by another attorney who claims that his participation in the pretrial proceedings aided the settlement of the class actions.

The questions raised by this application are not to be confused with the problems existing in connection with reimbursement for expenses incurred in acting as lead or liaison counsel in cases transferred for coordinated pretrial proceedings by the Panel on Multidistrict Litigation. See Proposed Manual for Complex Litigation, supra at 49. I understand that the Panel is presently considering those problems where there is failure of voluntary cooperation.

There is no doubt that a tremendous amount of legal services was rendered in connection with this litigation, all of which has been detailed and referred to in other portions of this opinion. However, the affidavits submitted by counsel on this phase of the application resemble the testimony of the drivers of 2 cars describing how they collided.

I subscribe to the principle that counsel who contributed to the benefit conferred on the class are entitled to compensation for that effort. This is true even though counsel did not appear in the particular actions being settled. Representation of claimants does not give an attorney standing on the issue involved. Counsel seeking a portion of this counsel fee were privately retained and instituted individual actions on behalf of their clients. It is their activities in this related litigation that gives them standing to assert a claim. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *United States v. ASCAP*, 466 F.2d 917 (2d Cir. 1972).

Counsel will be advised of the date for a hearing on the application for an apportionment of the fee allowed for services rendered in obtaining a settlement of the national class actions.

So ordered.

Dated: New York, N. Y.
December 27, 1972

Charles M. Metzner
U. S. D. J.

METZNER, District Judge: The parties have moved for court approval of a proposed settlement of three national class actions and for a reasonable counsel fee in what has been known as the "central station protection service" litigation.

I. The Settlement

In 1966 the Supreme Court affirmed a judgment in favor of the government in an action seeking relief for alleged violations of §§ 1 and 2 of the Sherman Act by Grinnell Corporation and three of its affiliates, American District Telegraph Company (ADT), Holmes Electric Protective Company (Holmes) and Automatic Fire Alarm Company of Delaware (AFA). 384 U. S. 563. The decree enjoined the defendants from violating the law and required divestiture by Grinnell of its affiliates. A final decree was entered by the district court on July 11, 1967.

As can easily be imagined, a slew of private actions were then instituted seeking treble damages from the four defendants. 68 such actions were filed in this court and all of them were assigned to me pursuant to Rule 2 of the General Rules of the Southern District of New York. In addition, 16 of the cases pending in other districts of the country were assigned to me for coordinated pretrial proceedings by the Judicial panel on Multidistrict Litigation pursuant to 28 U. S. C. § 1407.

The cases fell into two categories. One consisted of plaintiffs who were competitors of the defendants and the other consisted of plaintiffs who were subscribers to defendants' services. It became apparent that coordinated or consolidated pretrial proceedings would be difficult in this litigation because the claims of one group required proof that might defeat the claims of the other. The competitor plaintiffs wanted to show that in the cities where they operated, the defendants exercise monopoly power to drive prices down in order to force those plaintiffs out of business. Subscriber plaintiffs, on the other hand, wished to show that the defendants used their monopoly power to fix an unreasonably high price for the services rendered. A great many of the subscriber plaintiffs were located in cities where competition existed.

23 of the 24 competitor cases have now been settled for a total of some $12,000,000. A subscriber suit by the United States government has likewise been settled. 56 other subscriber actions are still pending. 3 of these are the national class actions with which we are now concerned.

[Subscriber Cases]

The *Vine Street* action is brought on behalf of all owners and operators of retail stores, shopping centers, office buildings, apartment houses, hotels and motels, theatres and other amusement buildings and private institutions situated throughout the United States. The *Manhattan-Ward* action is brought on behalf of all owners and operators of industrial and commercial manufacturing plants situated throughout the United States. The *City of Detroit* action is brought on behalf of all state, county, and local government and public bodies, and public schools and school districts situated throughout the United States. By definition these national class actions would embrace the claims of all pending subscriber actions except 3 statewide class actions on behalf of governmental entities in those states which are excluded from the proposed settlement.

[Class Actions]

The proposed settlement is predicated upon an assumption that the actions are proper class actions. The parties had briefed and argued the class action issue and while the matter was *sub judice* the court was requested not to proceed with determination of the issue because the parties were engaged in settlement negotiations. The effect of the existence of this issue will be discussed later on in this opinion. The notice of settlement mailed to subscribers also included the material required by Fed. R. Civ. P. 23(c)(2) for exclusion and appearance by counsel.

[*Amount of Settlement*]

The settlement offer contemplates the payment of $10,000,000 by the defendants to cover all 3 national class actions. Grinnell will contribute $3,850,000 toward the settlement in 3 installments through 1974. ADT will contribute $4,850,000 in 3 installments through 1974. Holmes will contribute $900,000 in 2 installments, payable on January 15, 1975 and January 15, 1976. AFA will contribute $400,000 payable in 2 installments on the same dates as Holmes. All deferred payments are to bear interest at 1% over the prime rate existing during the period.

The damage period covers 11¼ years from April 13, 1957 to July 11, 1968. The starting date is 4 years prior to the institution of the government enforcement action, which represents the usual statute of limitations period. Clayton Act § 4B.

Notice of this application was mailed to some 89,000 customers of defendants who had totaled billings of some $800,000,000 during the damage period. In addition, publication of the notice appeared for 3 consecutive weeks in both the Wall Street Journal (all regional editions) and the New York Times. 14,156 customers filed claims involving total billings of $330,525,000. $37,979,000 of these claims has been challenged either by the plaintiff or the defendants. In addition, the total billings included excise taxes of about $25,000,000.

The proposed settlement would thus afford a recovery of from 3.2% to 3.7% to customers who filed claims for the 11¼ year damage period. The exact percentage will depend on the resolution of the contested claims and whether or not the amount of excise taxes is included in the computation.

[*Court's Function*]

Rule 23(e) requires that a class action may be compromised only with the approval of the court. Approval should be given if the settlement is fair, reasonable and adequate. The settlement hearing should not be turned into a trial or a rehearsal of the trial. *Newman v. Stein*, 464 F. 2d 689, 692 (2d Cir. 1972). The evaluation of the proposed settlement in this type of litigation against this standard requires an amalgam of delicate balancing, gross approximations and rough justice. *Saylor v. Lindsley*, 456 F. 2d 896, 904 (2d Cir. 1972).

In *Protective Committee v. Anderson*, 390 U. S. 414 (1968), the Court said at pages 424-25:

> "Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation."

The very purpose of a compromise is to avoid determination of sharply contested issues and to dispense with wasteful litigation. *In re Prudence*, 98 F. 2d 559 (2d Cir. 1938). At the same time the court must weigh the relative advantages and disadvantages of the positions of the respective parties. In *Florida Trailer & Equipment Co. v. Deal*, 284 F. 2d 567, 571 (5th Cir. 1960), the court said:

> "But the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements."

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In addition to considering the strength of the case for the plaintiffs against the amount offered in settlement, the court must weigh the judgment of counsel for plaintiffs, the extent of support from interested parties, and the presence or absence of good faith bargaining. *State of West Virginia v. Chas. Pfizer & Co.* [1970 Trade Cases ¶73,240], 314 F. Supp. 710, 741 (S. D. N. Y. 1970), aff'd [1971 Trade Cases ¶73,540], 440 F. 2d 1079 (2d Cir.), cert. denied, 404 U. S. 871 (1971).

[*Objections*]

Objections to the proposed settlement come from a very small number of claimants, only one of whom had previously filed an individual lawsuit. 150 of the 14,000 claimants were represented by attorneys in filing their claims, and only 5 of these attorneys object to the settlement. Their clients represent ½ of 1% of the billings for all claimants.

At the first pretrial conference called to coordinate the pretrial proceedings for all 84 cases, the court appointed a committee of 3 attorneys (the "Troika"), selected by counsel for all subscriber plaintiffs, to represent those plaintiffs in future proceedings. Such a committee was designed to afford greater efficiency in presenting or defending against motions and in the conduct of discovery. 2 of these 3 attorneys represent plaintiffs (some with multiple installations) who have joined the class as claimants and do not object to the settlement. They also represent other clients who have filed claims. 11 of the individual subscriber plaintiffs have filed claims in the proposed settlement. Only 36 of the individual plaintiffs have opted out and their cases remain pending in addition to the 3 statewide governmental class actions. I understand that these 39 cases represent $50,000,000 of billings. I point out these facts as an indication of the views of attorneys who have lived with this litigation for a number of years and are fully familiar with the discovery as it exists today.

[*Discovery*]

That discovery is huge. It consists of everything that was produced in the government suit (documents, depositions; and transcript of the trial, as detailed in 236 F. Supp. at 247), documents produced and depositions of the defendants taken in the *Sentinel* case in the Eastern District of Pennsylvania (this was a subscriber case which was settled before trial), and the tremendous amount of information furnished to subscriber plaintiffs in the consolidated pretrial proceedings in this court. One interrogatory alone, propounded by the Troika, required 3,000 pages for its answer. All of the above material was placed in a depository originally leased at 205 Pearl Street in this city. The court personally visited those premises and observed the volume and organization of the material in some 260 filing drawers and open shelves.

The main objections to the settlement are voiced by a law firm in Philadelphia on behalf of 20 claimants who had total billings of $270,000 during the damage period. Parenthetically, counsel for the class plaintiffs is also from Philadelphia, where the national class actions and 3 other individual subscriber cases were originally filed. Objecting counsel admits that he has expertise in the field of antitrust litigation and that some of the claimants he represents are substantial businesses. 3½ years after the statute of limitations has run this firm appears and projects an astronomical estimate of what is involved in this case. An example of this magnifying glass approach is found in counsel's reference to $800,000,000 in total billings for the 11¼ year damage period as a basis to be used in evaluating the proposed settlement. Claimants with only $330,000,000 in billings have shown an interest in filing claims, and it is this figure which must be considered as the maximum in evaluating the settlement.

Of course, the amount of damage with which we are concerned is not the total billings of $330,000,000 but only the portion of that figure attributable to the exercise of monopoly power or restraints of trade by defendants.

The objectors refer to what they call the net settlement figure in arguing the inadequacy of the offer. This completely ignores the obligation of the beneficiaries of the settlement to pay their share of the cost of the litigation which results in a recovery for them. Whatever the net may be, the fact is that the defendants are offering to pay $10,000,000, and this is the figure to be evaluated. The amount of counsel fees is for the court's determination and will be discussed later on in this opinion.

[*Probable Damages*]

Objection is made to the failure of the attorneys for the class to obtain the services of an expert economist to aid in determining the potential damages. See Proposed Manual for Complex Litigation (Feb. 1972),

¶ 1.46. This objector has stated that he has consulted with an expert who is ready to testify that the provable damages after trial should run between 3% and 7% of total billings. It is not necessary to have an evidentiary hearing with this expert as a witness, since I consider that the proposed settlement of 3.2% to 3.7% is "well within the ball park" of this offer of proof. I should point out that the damage period here is 11¼ years, whereas in most of the other settlements achieved in class action antitrust cases, the period under the statute of limitations for such actions is 4 years. If the proposed settlement here is evaluated on a 4-year basis, the figure would fall between 9% and 11%.

Objectors proceed to enlarge on their 3-7% figure by saying that since this is an antitrust suit the figure should be trebled, which raises their economist's figure to 9-21%. In settling these cases, negotiations are usually conducted on a single damage basis. One of the reasons for this is that defendants are not admitting the type of wrongdoing contemplated in a final judgment after trial. This is somewhat akin to to the consent judgment in a government enforcement action, with its usual "without admitting the truth thereof" clause. It facilitates the disposition of the litigation.

One of the objectors points to the so-called O'Brien memorandum in urging this court to refuse to approve the settlement. Frankly, it does not have the impact of the famous Raskob report which gave life to the government enforcement action against du Pont and General Motors. *United States v. du Pont & Co.* [1957 TRADE CASES ¶ 68,723], 353 U. S. 586, 600-02 (1957); *Gottesman v. General Motors Corp.* [1967 TRADE CASES ¶ 72,304], 279 F. Supp. 361, 365 (S. D. N. Y. 1967). The O'Brien memo must be read in context and does not bring the plaintiffs to a simple assessment of damages, as hoped for. It must be read in its entirety and then compared with the answering McDonald memorandum and the factual material produced in the pretrial proceedings.

[*Fraudulent Concealment*]

The objectors also place a great deal of emphasis on what they claim is an issue of fraudulent concealment in this case. Of course, the existence of such a factor would have a distinct bearing on the time period to be embraced by any settlement.

While plaintiffs have alleged fraudulent concealment in their complaints, I doubt that such an allegation is ever absent in litigation of this type. It appears in the complaints of many of the individual subscriber plaintiffs in this litigation. No one has pressed it in those cases, where discovery begins with 1957.

The relationship between the defendants was public and common knowledge for a long time. The first private suit was filed in Philadelphia a year before the government even instituted its enforcement action. I find no substance to the objectors' claim that fraudulent concealment exists in this case.

[*Adequacy of Research*]

It seems to me that the objectors have failed to fully use the depository to come up with a factual basis for their arguments. The first notice of this settlement went out in the middle of December 1971 and the hearing was held on May 24, 1972. The objectors claim they spent 4 days in the depository during that time, reading opinions, some depositions and some documents in the government case. To impress the court with the poor condition in which they found the depository, they refer to the fact that 10 drawers were locked and that the defendants refused to open them despite repeated requests. These drawers were locked because they contained documents under a protective court order in a case which had been settled in Pennsylvania and which had not been transferred here. In any event, there were 250 other drawers that could have been helpful.

I would again make special note of the huge amount of discovery in the subscriber cases, both in answers to interrogatories and document production. There is no indication that this material was reviewed by the objectors. The answers to interrogatories 18 and 19 furnish abundant information regarding the liability and damage issues in this litigation. I can only assume that the acquiescence in the settlement by counsel in 11 individual subscriber actions is based on the information they obtained from this discovery.

In any event, whether we are involved with a potential 3% to 7% or a 9% to 21% recovery, the hazards of litigation must be evaluated. To place the heaviest burden on the fairness of the proposal, the risks of litigation must be measured against the optimum recovery treble damages of 21% on an 11-year damage period.

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[*Possible Issues*]

It is true that the government judgment will be prima facie evidence in these cases, but it does not follow, as argued by some objectors, that this leaves open only the damage aspects of the litigation. The issue of relevant market is a close one. The dissents of the 3 justices in the government case were based on their disagreement with the majority on this issue. Justice Harlan was of the view that relevant product market was not sufficiently proved. Justices Fortas and Stewart were of the view that neither the relevant product market nor the geographical market was properly defined. Judge Wyzanski, who tried the original case and then conducted the hearings after remand by the Court, has said that if he had read Justice Fortas' dissent before he rendered his original determination, he would have followed the justice's reasoning because "it went to the heart of my error."

[*Relevant Market*]

From my exposure to these cases, in the context of private litigation on behalf of competitors and subscribers, I find additional problems with which the Court was not faced. The definition of relevant market, both geographical and product line, may have been proper for the government enforcement suit on the theory of monopolization. It does not follow that it is proper for the private litigation with which we are concerned.

[*Monopoly Power*]

Secondly, liability in the government suit was predicated in the main on the existence of monopoly power, 384 U. S. at 566, 570, 584 and 586. Counsel for a number of competitor plaintiffs, who also represent subscriber plaintiffs not objecting to the settlement, have stated that in their opinion the only persons who suffered damages from the exercise of this power were the competitors. The evidence upon which they relied to settle their competitor cases showed that in cities in which defendants did not have any competition the rates charged were "normal" and "competitive," while in cities in which competition existed "defendants were charging cut-throat competitive rates in an attempt to force competitors out of business." Of course, the beneficiaries of this latter competition would be subscribers to defendants' services in such cities. Approximately 8,800 of the 14,156 subscribers who filed claims come from such cities. Most of the objectors also come from such cities. (Incidentally, Judge Wyzanski pointed out that even in cities in which there was no competition the defendants were not always able to charge their minimum basic rates. 236 F. Supp. at 254.)

The impact of these factors strongly favors the settlement. This is so even though the court is aware that the fact of damage, which is an element of liability, is satisfied by proof of some injury flowing from defendants' alleged illegal acts, and that "inquiry beyond this minimum point goes only to the amount of damage." *Zenith Radio Corp. v. Hazeltine Research, Inc.* [1969 TRADE CASES ¶ 72,800], 395 U. S. 100 (1969); *Trans World Airlines v. Hughes* [1970 TRADE CASES ¶ 73,017], 308 F. Supp. 679, 685 (S. D. N. Y. 1969).

[*Trial for Amount of Damages*]

Because of the disparity in charges between cities and the various competitive local factors, defendants are ready to contest each of the 14,156 claims on the amount of damages, even though liability may be proven. Assuming, for the moment, that the class action status is resolved in favor of plaintiffs, interesting trial problems are present, since the case is to be tried to a jury. Defendants' right to a jury determination of the damages for each asserted claim is not lost because this is a class action. While Rule 23 has been given broad application, no one suggests that it has repealed the Seventh Amendment. After appropriate discovery by the defendants has been obtained, and the litigation has not even reached that point yet, it is fair to assume a minimum of one hour for the presentation and defense of each claim. Thus, we can look forward to about 14,000 trial hours on the damage claims alone. With an average of 6 hours a day devoted to actually hearing testimony, the trial will take some 2,300 days or about 11 years. Assuming the greatest cooperation possible among advocates strongly prosecuting or defending a position, you might dispose of the matter within 5 years. I speak of strong advocacy on the part of the claimants because if there is anything less you may not assume a maximum recovery of 21%.

[*Demands on the Judicial System*]

The questions of administration raised by such a trial are: Do you use the same jury to decide the entire damage issue? Does the same judge preside over this trial to the exclusion of his other more pressing work, such as criminal trials or applications for preliminary and permanent injunctions? Or is the judge relieved of all other assignments? Even if several judges and juries are used (including perhaps fragmentizing the proceedings into cities and their respective judicial districts), a huge amount of judicial time of any single judge and his court personnel would be devoted to the matter. Even though the defendants may ultimately be found liable to some or even all of the claimants, this demand on the existing judicial system must be evaluated in determining the reasonableness of the settlement. See *Protective Committee v. Anderson, supra.*

The across-the-board nature of the settlement might be objected to because some claimants will receive less than they are entitled to, as a percentage of actual damage suffered, while others will receive more. This is apparent from the disparity in charges and the actual competitive picture from city to city. As I stated above, most of the objectors to the settlement appear to be located in areas were competitor facilities existed. However, the formula adopted is the only realistic one to be considered in determining whether the settlement should be approved.

[*Financial Ability*]

Another factor to be considered here is the financial ability of all or any of the defendants to satisfy the maximum amount which the objectors contend will be theirs if the litigation goes to judgment. The prospect of a bankrupt judgment debtor at the end of the road does not satisfy anyone involved in the use of class action procedures. I can understand that some installment payments under the proposed settlement may have implications other than an inability to pay. Under the proposed settlement, 87% of the recovery will be paid within 2 years. However, the 2 defendants with the smallest contributions, AFA and Holmes, will pay their $1,300,000 in 4 installments. It is clear that at least as to these 2 defendants the extended time for payment is attributable to financial inability.

[*Class Actions*]

Finally, we come to the issue of whether the actions may be maintained as class actions. I have referred above to the problem of relevant market. Obviously, any change in the definition of relevant market, either geographical or product line, after a trial of the issue of liability or as an issue in a separate trial, would seriously affect the determination of the existence of a national class action.

[*Injury*]

Assuming that the definition of the relevant market remains the same, it does not follow that a national class action may be maintained under the guidelines of Rule 23(a) and (b). The question of impact, essential to the determination of liability in a private damage suit, presents difficulties in the context of a national class action. There are differing competitive climates in each of the areas involved. All the members of a class did not contract for the same services, even in the same city.

Defendants properly point out that a large number of the individual subscriber actions, instituted prior to the bringing of these asserted class actions, involved total billings less than that claimed by the named plaintiffs in the class actions. Consequently, it would appear that as far as these plaintiffs are concerned the class action vehicle in this antitrust litigation is not necessary to adequately protect their rights. They cannot assume the self-anointed role of protector of the small claimant through use of class action procedures, with the pot of gold at the end of the rainbow for counsel. If these plaintiffs were successful at trial, they would be compensated with treble damages and an award of counsel fees charged against the defendants as an added cost of the litigation. Clayton Act § 4. There are separate rules for the determination of counsel fees after judgment in this type of case, and the fees are not tied to the amount of recovery. *Trans World Airlines v. Hughes* [1970 TRADE CASES ¶ 73,142], 312 F. Supp. 478 (S. D. N. Y. 1970).

Finally, on the issue of class action status, I refer to the discussion above regarding the manageability of this litigation. What was said there is pertinent here.

These facts which bear on whether a class action is maintainable in this litigation show that the resolution of that question is neither easy nor free from doubt. The uncertainty as to resolution of the problem has substantial impact in determining the reasonableness of the settlement. The statute of limitations has long since run in this litigation. Denial of class action status would preclude recovery by any of the claimants because none of them can say that they relied on the existence of these

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actions for not having instituted a timely suit.

It is clear to this court, after reviewing all of the problems in this litigation, and following the established guidelines for evaluating offers of settlement, that $10,000,000 is a fair and reasonable settlement of the claims embraced in the 3 national class actions. The settlement is approved.

II. *Counsel Fees*

We now address ourselves to counsel's application for a reasonable fee for his services rendered to the class action plaintiffs. Counsel has requested a flat 25% of the $10,000,000 settlement fund, or $2,500,000, as reasonable compensation for his efforts. Added to this would be the necessary disbursements incurred in the course of the litigation.

[*Flat Percentage Fee*]

Opposition to this fee application has been voiced by a number of claimants who are satisfied with the settlement in addition to those who opposed it. The opposition was vehement and strenuous. A separate day had to be set aside for oral argument by the objectors to the fee application. At the outset, I must repeat what I have said numerous times in the past, and that is that a flat 25%-of-recovery formula is nonexistent as far as I am concerned. There are many factors to be considered in fixing the value of professional services in class actions instituted on a contingent fee basis. See Proposed Manual for Complex Litigation, *supra,* ¶ 1.47. These factors will be discussed as we review counsel's activities in these cases.

[*Hours Spent*]

Counsel has detailed some 6200 hours spent on this litigation by senior and junior attorneys in his law firm and paraprofessionals. Such paraprofessional aid is gaining acceptance by the bar, and can reduce overhead expense in the operation of a law firm while increasing the quality of the services rendered. Brickman, Expansion of the Lawyering Process Through A New Delivery System, 71 Col. L. Rev. 1153 (1971). Hopefully, paraprofessionals might also reduce the cost of litigation to persons with valid claims who, even though not impecunious, cannot afford the fees for the effective advocacy necessary to successfully prosecute those claims.

Counsel estimates that a minimum of an additional 1000 hours will be necessary to complete the administration of the settlement. This will include the determination of challenges to some 700 claims and problems attendant to the ultimate distribution of the settlement fund.

[*Paraprofessionals*]

Two comments have been made as to the number of hours reported. First, it is pointed out that half of the time spent is referrable to paraprofessionals. Second, there is no delineation between time spent prior to reaching the settlement agreement and time spent after the signing of the order setting in motion the procedures for approving the settlement. These observations will be kept in mind in weighing the time factor in fixing the fee.

[*Importance of Hours Spent*]

The weight to be given hours spent in arriving at a reasonable counsel fee in the contingent fee class action is less than that given in a Clayton Act § 4 situation. Cf. *Trans World Airlines v. Hughes* [1970 Trade Cases ¶ 73,142], 312 F. Supp. 478 (S. D. N. Y. 1970). However, it is still a factor, and counsel must be prepared to submit a record of the time spent in these cases. *Fox v. Glickman Corp.*, 253 F. Supp. 1005 (S. D. N. Y. 1966). The court also considers that the existence of a contingent fee arrangement itself should be given appropriate consideration in fixing this fee.

[*Benefits to Class*]

I am mindful of Professor Hornstein's oft-quoted statement, constantly referred to by counsel for plaintiffs in class actions, that in contingent fee case "One thousand plodding hours may be less productive than one imaginative, brilliant hour." Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards, 69 Harv. L. Rev. 658, 660 (1956). However, in applying that observation we must examine the benefit conferred on the class and determine whether it flows from counsel's skillful operation or plodding effort.

[*Time of Filing Suit*]

These class actions were instituted just 2 months before they would have lost the benefit of the tolling provisions of § 5(b) of the Clayton Act. For this, counsel deserves much credit. If the cases had not been filed when they were, the objectors to the fee and all other claimants would be receiving nothing or only a small percentage of what they will now receive. The damage period would have been limited to 4 years, commencing 3 years after the institution of the government suit. This obviously would affect the size of any settlement offer by defendants. In addition, the prima facie effect of the government decree would be affected. Cf. *Gottesman v. General Motors Corp.* [1969 TRADE CASES ¶ 72,888], 414 F. 2d 956 (2d Cir. 1969). Plaintiffs have the advantage of a damage period of 11¼ years, going back to 4 years prior to the institution of the government suit.

[*Individual Suits*]

None of the claimants can say that, but for these class actions, they would have instituted individual suits or class actions prior to September 1968 to protect their interests. This fact gains added significance when we recall that 55 individual subscriber actions were timely instituted, and some of the objectors here dwarf any of such plaintiffs in financial resources. On the other hand, the existence of this number of individual suits, many instituted more than a year prior to these class actions, somewhat diminishes credit to counsel for having the foresight to bring the suits.

[*Discovery Work*]

In his fee application, counsel has detailed his work with regard to the prosecution of these claims. He states that he was a member of the Steering Committee for all plaintiff actions. This was an informal committee in operation prior to the assignment of all of the cases to me either pursuant to Rule 2 or § 1407. Subsequently, I gather that counsel worked with the Troika in the following areas: (a) drafting the motion for production of documents, (b) preparing the interrogatories submitted to defendants on behalf of all subscriber plaintiffs, and (c) resisting defendants' motion for partial summary judgment. He was involved in resisting the motion by AFA to dismiss all of the actions against it and was involved in the companion motion to substitute AFA of New York as a party defendant.

All of this activity was important. The production of documents and the answers to interrogatories are so necessary in antitrust litigation. The material here included much that was not included in the government discovery. The information furnished by the defendants obviously went a long way toward developing the basis for a settlement of the class actions. The partial summary judgment motion brought by the defendant, involving the tolling provisions of the Clayton Act, was bitterly fought by all plaintiffs. *Russ Togs, Inc. v. Grinnell Corp.* [1969 TRADE CASES ¶ 72,931], 304 F. Supp. 279 (S. D. N. Y. 1969), aff'd [1970 TRADE CASES ¶ 73,172], 426 F. 2d 850 (2d Cir.), cert. denied, 400 U. S. 878 (1970). There then followed extensive briefing and oral argument as to whether these lawsuits would be granted class action status. While the matter was *sub judice*, the court was requested to withhold disposition pending the outcome of settlement negotiations.

With the submission of the proposed settlement, counsel (as a member of the Class Action Committee) undertook the supervision of the procedures set forth in Settlement Order No. 1. Following that order over 14,000 claims were filed and processed, corrections were sought and challenges entered. Finally, counsel has vigorously participated in the proceedings to approve the settlement.

Counsel has been an active participant in many of the class action antitrust suits filed in the last 5 years in the various district courts. 9 of these have been disposed of and 10 are still pending. There is no doubt that counsel has acquired, as a result of these experiences, an expertise in the handling of such matters.

[*Class Notice*]

Counsel seeks credit for some items of accomplishment which I find unjustified. For example, neither the extent of the dissemination of the notice nor the inclusion of the settlement terms therein should be given much weight. Certainly this court would never approve, under the facts of this case, any lesser notice than was given. Furthermore, notice of the settlement is required by Rule 23(e). Neither is the court persuaded that any weight should be given to the fact that counsel is not requesting fee participation in the interest to be paid by the defendants on the deferred payments. The installment payments are for the benefit of the defendants. The claimants are being deprived of the use of the money because of the installment procedure, and are entitled to interest as compensation for that loss.

[*Government Investigation*]

I should also point out that the existence of the government investigation and the existence of a judgment available for use under § 5(a) of the Clayton Act are factors

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to be considered in determining the reasonableness of the fee.

This is a big case. $10,000,000 is not a small sum of money. The dollar amount of claims filed compared to total billings is high. It is true that class actions serve a useful purpose in protecting the individual whose claims might be so small as to not justify independent action. Such actions involve the undertaking of risks by counsel and justify the use of a percentage of recovery as one of the factors in evaluating the requested allowance of counsel fees. However, it would appear that the amount of risk involved does not increase tenfold simply because we are concerned with a $10,000,000 settlement instead of a $1,000,000 settlement. After a certain point is reached, the size of this counsel fee must be limited.

The court does not necessarily look to the fee a claimant individually would be willing to pay to recover his small share. These cases should be viewed from the adequacy of the fee to be received by counsel commensurate with the risks he has taken, the work he has done, the results he has obtained and the *pro bono publico* efforts involved in this type of litigation.

[*Amount of Fee*]

Under all the facts and circumstances which I have outlined above, I find that a fee of $1,500,000 is adequate in these 3 cases. The Proposed Manual for Complex Litigation, *supra*, states at page 43 that "Once adequate compensation sufficient to provide the motive for representation of classes is provided, no further incentive is required." I am sure that petitioning counsel will not be deterred from becoming involved in any future class actions because of the size of the fee allowed here. I am equally convinced that other attorneys will not be dissuaded from protecting the poor litigant in similar circumstances.

[*Out-of-Pocket Expense*]

Petitioning counsel is also allowed $14,918.73 as out-of-pocket expenses to April 20, 1972. Requests for further reimbursement of expenses will be entertained only on an application setting forth categories and dates when the expenses were incurred.

[*Role of Lead Counsel*]

An interesting question has been presented by the application of the members of the Troika and a fourth attorney to participate in whatever fee is allowed to counsel for the class action plaintiffs. In preparing for the first pretrial conference of counsel in all 84 cases, I sent a 2-page letter of proposed procedures to counsel, dated May 21, 1969. That letter contained a directive that counsel for all plaintiffs meet the day before the pretrial conference and select one of their number to be designated as lead counsel. Lead counsel is necessary for the efficient conduct of pretrial proceedings as envisaged by the coordinated proceedings under 28 U. S. C. § 1407. Such designation would have been required even if the court were only concerned with the 68 cases filed in this district.

At the pretrial conference held on June 17, 1969, the court was advised that counsel had decided that because of the huge number of plaintiffs' attorneys involved, the work of lead counsel should be distributed among 3 law firms rather than one. The recommendations for appointment were Mr. Millstein, of Weil, Gotshal and Manges, Mr. Robinson, of Liebman, Eulau, Robinson and Perlman, and Mr. Stein and Mr. Brett, of Parker, Chapin and Flattau. All of those designated were well versed in the intricacies of antitrust law and class action proceedings and members of distinguished law firms. The designations were formalized in Pretrial Order No. 1 dated July 2, 1969.

These attorneys contend that a great deal of the benefit conferred on the class by the settlement flows directly from their efforts. It is their position that plaintiffs' counsel in the class actions should not receive more than 20% of the settlement as a fee and that they are entitled to ¼ of that amount, or ¼ of whatever amount the court ultimately grants. In addition, a claim for 10% of the fee awarded is requested by another attorney who claims that his participation in the pretrial proceedings aided the settlement of the class actions.

The questions raised by this application are not to be confused with the problems existing in connection with reimbursement for *expenses* incurred in acting as lead or liaison counsel in cases transferred for coordinated pretrial proceedings by the Panel on Multidistrict Litigation. See Proposed Manual for Complex Litigation, *supra* at 49. I understand that the Panel is presently considering those problems where there is failure of voluntary cooperation.

There is no doubt that a tremendous amount of legal services was rendered in connection with this litigation, all of which has been detailed and referred to in other portions of this opinion. However, the affidavits submitted by counsel on this phase of the application resemble the testimony of the drivers of 2 cars describing how they collided.

I subscribe to the principle that counsel who contributed to the benefit conferred on the class are entitled to compensation for that effort. This is true even though counsel did not appear in the particular actions being settled. Representation of claimants does not give an attorney standing on the issue involved. Counsel seeking a portion of this counsel fee were privately retained and instituted individual actions on behalf of their clients. It is their activities in this related litigation that gives them standing to assert a claim. *Sprague v. Ticonic Nat'l Bank*, 307 U. S. 161 (1939); *United States v. ASCAP* [1972 TRADE CASES ¶ 74,179], 466 F. 2d 917 (2d Cir. 1972).

Counsel will be advised of the date for a hearing on the application for an apportionment of the fee allowed for services rendered in obtaining a settlement of the national class actions.

So ordered.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
------------------------x

CITY OF DETROIT, et al., : **FINAL JUDGMENT**
Plaintiffs, :
-against- : 68 Civ. 4026 (EDPa. Civ. 68-1478)
GRINNELL CORPORATION, AMERICAN DISTRICT TELEGRAPH COMPANY, HOLMES ELECTRIC PROTECTIVE COMPANY and AUTOMATIC FIRE ALARM COMPANY OF DELAWARE, :
Defendants. :
------------------------x

MANHATTAN-WARD, INC., et al., :
Plaintiffs, : 68 Civ. 4028 (EDPa. Civ. 68-1489)
-against- :
GRINNELL CORPORATION, et al., :
Defendants. :
------------------------x

1225 VINE STREET BUILDING, INC., et al., :
Plaintiffs, :
-against- : 68 Civ. 4027 (EDPa. Civ. 68-1479)
GRINNELL CORPORATION, et al., :
Defendants. :
------------------------x

The Court having held a hearing on June 5, 1972, after due notice to members of the classes pursuant to Orders dated December 13, 1971, and April 3, 1972, to determine the Petition of counsel for class representatives for an award of counsel fees and costs (hereinafter "Petition"), and the Court having considered the written submissions in support of and in opposition to approval of said Petition and having heard all persons appearing and requesting to be heard and due deliberation having been had thereon, and pursuant to this Court's Decision and Order of December 27, 1972, and, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, having expressly directed the entry of this Final Judgment as to an award of attorney's fees to counsel for the Class Representatives and having determined that there is no just reason for delay in entering this Final Order so that this Court's Decision and Order of December 27, 1972, can be implemented,

IT IS HEREBY ORDERED AND ADJUDGED:

1. Counsel for the Class Representatives, David Berger and David Berger, P.A., Attorneys at Law (hereinafter "Counsel for the Class Representatives"), are allowed $14,914.73 as out-of-pocket litigation expenses to April 20, 1972, to be paid from the initial installment of the Settlement Fund. Requests for further reimbursement of expenses by Counsel for the Class Representatives will be entertained only on an application setting forth categories and dates when the expenses were incurred.

2. Counsel for the Class Representatives is awarded attorney's fees in the amount of $1,500,000, such fees to be paid from the Settlement Fund in the above-entitled actions.

3. This Court retains jurisdiction of this matter for the purpose of:

(a) determining the petitions of (1) Weil, Gotshal & Manges; Liebman, Eulau, Robinson & Perlman; and Parker, Chapin & Flattau, and (2) of Wald, Harkrader & Ross for an apportionment of the attorney's fee awarded to the Class Representatives;

(b) determining the manner and time of payment of said fees; and

(c) determining further allowance of out-of-pocket expenses to Counsel for the Class Representatives.

4. A copy of this Final Judgment shall be docketed in each of the above-entitled actions with the same force and effect as if the original thereof was filed therein.

Dated: New York, New York
January 26, 1973

/s/ Charles M. Metzner
U.S.D.J.

U.S. District Court
Filed
FEB 16 1973
S.D. of N.Y.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al., : 68 CIV. 4026
v. :
GRINNELL CORPORATION, et al. : (E.D. Pa. CIV. 68-1478)

MANHATTAN-WARD, INC., et al., : 68 CIV. 4028
v. :
GRINNELL CORPORATION, et al. : (E.D. Pa. CIV. 68-1489)

1225 VINE STREET BUILDING, et al., : 68 CIV. 4027
v. :
GRINNELL CORPORATION, et al. : (E.D. Pa. CIV. 68-1479)

NOTICE OF APPEAL AND AMENDMENT TO PRIOR NOTICE OF APPEAL

Notice is hereby given that Bay Fair Shopping Center; Exxon Corporation, successor by merger to the Humble Oil & Refining Company; Friendswood Development Company; Garden State Plaza Corp.; International Lubricant Corporation; and Shell Oil Company, claimants herein, hereby appeal to the United States Court of Appeals for the Second Circuit from the Final Judgment entered on January 26, 1973, awarding attorneys fees out of the settlement fund of $1.5 million to David Berger and others, which amount is excessive, unsupported by the record, and was awarded without an evidentiary hearing. This Notice of Appeal amends and supplements the Notice of Appeal filed February 1, 1973, to read as above stated.

Respectfully submitted,

William Simon

WILLIAM SIMON
G. JOSEPH KING
HOWREY, SIMON, BAKER & MURCHISON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 872-8800

Attorneys for
Bay Fair Shopping Center, Exxon Corporation, Friendswood Development Company, Garden State Plaza Corp., International Lubricant Corp. and Shell Oil Company

Dated: February 13, 1973

MAR 5 1973
S.D. N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

CITY OF DETROIT, et al., :

v. : 68 Civ. 4026 (E.D. Pa. Civ. 68-14[illegible]

GRINNELL CORPORATION, et al. :

- -x

MANHATTAN-WARD, et al., :

v. : 68 Civ. 4028 (E.D. Pa. Civ. 68-148[illegible]

GRINNELL CORPORATION, et al. :

- -x

1225 VINE STREET BUILDING, INC., et al., :

v. : 68 Civ. 4027 (E.D. Pa. Civ. 68-1479)

GRINNELL CORPORATION, et al. :

- -x

STIPULATION AS TO RECORD

Pursuant to Rule 11(f) of the Federal Rules of Appellate Procedure, it is stipulated between the undersigned counsel for appellants, and counsel for David Berger, Esquire, that for purposes of the instant appeal, documents filed in cases numbered 68 Civ. 4027 and 68 Civ. 4028 shall be retained in the Office of the Clerk of the District Court and shall not be transmitted to the Court of Appeals unless any such document is not also duplicated in the files of case No. 68 Civ. 4026.

By ____________________
[illegible]
HOWREY, SIMON, BAKER & MURCHISON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 872-8800

Counsel for Appellants
Bay Fair Shopping Center, Exxon
Corporation, Friendswood Development Company, Garden State Plaza
Corp., International Lubricant
Corporation, and Shell Oil Company

By Gordon Spivack
GORDON B. SPIVACK
LORD, DAY & LORD
25 Broadway
New York, New York 10004
(212) 344-8480

By ____________________
DAVID BERGER
DAVID BERGER, P.A.
ATTORNEYS-AT-LAW
1622 Locust Street
Philadelphia, Pennsylvania 19103

Counsel for David Berger, Esq.
and David Berger, P.A. Attorneys-at-Law

Dated: March ~~February~~ 2, 1973

City of Detroit, et al. v. Grinnell
Corporation, et al. 68 Civ. 4025

Manhattan-Ward, Inc., et al. v.
Grinnell Corporation, et al.
68 Civ. 4028

1225 Vine Street Building, Inc., et al.
v. Grinnell Corporation, et al.
68 Civ. 4027

Pizitz, Inc., et al. v. American
District Telephone Co., et al.
M 19 Civ. 92

This application for attorneys' fees in connection with the settlement of the national class actions was intended to be denied by the order of this court dated December 27, 1972 and the judgment entered thereon on January 26, 1973.

Petitioning counsel represents four co-plaintiffs in an independent action against the defendants originally instituted on August 18, 1967 in the Northern District of Alabama (67 Civ. 471). The action was one of the sixteen cases transferred on October 3, 1968 to this district by the Panel on Multidistrict Litigation. It appears that these plaintiffs have decided to forgo the prosecution of their independent action and have filed claims against the settlement fund in the national class actions.

From the affidavits submitted by counsel, it appears that the time which they spent on this matter was devoted to the interests of their four clients in the individual lawsuit. None of it appears to have been spent in connection with the prosecution of the class actions. Counsel is not entitled to participate in the fee allowed to counsel representing the class members. If counsel had expected a fee pursuant to Section 4 of the Clayton Act, it would have had to prosecute the action to successful judgment. Reference is made to the fact that counsel was associated with the firm of Weil, Gotshal & Manges, which firm was appointed as a member of the Troika to act as liaison counsel in connection with the prosecution of actions by individual subscribers to defendants' services. It may be that counsel might be entitled to some portion of whatever compensation the Weil, Gotshal & Manges firm may obtain as a result of its application for a fee in the national class actions, but that seems to me to be a matter between the respective law firms.

The application is denied.

So ordered.

Dated: New York, N.Y.
March 7, 1973

CHARLES H. [illegible]
U. S. D. J.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

CITY OF DETROIT, et al.,	:	68 CIV. 4026
v.	:	
GRINNELL CORPORATION, et al.	:	(E.D. Pa. CIV. 68-1478)
MANHATTAN-WARD, INC., et al.,	:	68 CIV. 4028
v.	:	
GRINNELL CORPORATION, et al.	:	(E.D. Pa. CIV. 68-1489)
1225 VINE STREET BUILDING, et al.,	:	68 CIV. 4027
v.	:	
GRINNELL CORPORATION, et al.	:	(E.D. Pa. CIV. 68-1479)

ORDER AND STIPULATION

RE FILING OF DOCUMENTS

It appearing that certain documents which had been duly and timely filed as reflected on the Clerk's docket sheets for the captioned cases are missing from the files of the Clerk's Office, and the undersigned counsel for appellants and appellees in appeal No. 73-1211, now pending in the United States Court of Appeals for the Second Circuit, having stipulated below that copies of said documents be filed and transmitted to the Court of Appeals as a supplement to the record on appeal, on the stipulation of the parties below, it is

CONFORMED COPY

ORDERED, this 10th day of April, 1973, that the Clerk of this Court is directed to file in case No. 68 Civ. 4026 the copies of said documents described on Exhibit A hereof and appended thereto, and forward said documents to the Clerk of the Court of Appeals as part of the record on appeal.

/s/ Charles M. Metzner
U.S.D.J.

It is hereby stipulated by the undersigned that copies of the documents described in Exhibit A and appended thereto are to be filed in case No. 68 Civ. 4026 and forwarded to the Court of Appeals as part of the record on appeal.

By: G. Joseph King
WILLIAM SIMON
G. JOSEPH KING
HOWREY, SIMON, BAKER &
MURCHISON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 872-8800

Counsel for Appellants Bay Fair Shopping Center, Exxon Corporation, Friendswood Development Company, Garden State Plaza Corp., International Lubricant Corporation, and Shell Oil Company

By: Gordon B. Spivack by JDB
GORDON B. SPIVACK
LORD, DAY & LORD
25 Broadway
New York, New York 10004
(212) 344-8480

By: David Berger by JDB
DAVID BERGER
DAVID BERGER, P.A.
ATTORNEYS-AT-LAW
1622 Locust Street
Philadelphia, Pennsylvania
19103

Counsel for David Berger, Esq. and David Berger, P.A., Attorneys-at-Law

Dated: April 10, 1973

EXHIBIT A

Document No. *	Date Filed	Brief Description
59	2-10-72	Mesirov, Gelman, Jaffe & Levin's motion of the Twenty Commercial and Industrial Members of classes of plaintiffs to compel discovery on the proposed settlement issues.
60	2-10-72	Mesirov, Gelman, Jaffe & Levin's memorandum in support of its motion to compel discovery on the proposed settlement issues.
63	2-14-72	Memorandum of class representatives plaintiffs in opposition to motion to compel discovery on proposed settlement issues.
65	2-28-72	Movants' Reply to plaintiffs' memorandum in opposition to motion to compel discovery on the proposed settlement issues.
66	3-1-72	Supplemental memorandum of class members representatives contra motion to compel discovery on the proposed discovery issues.

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* These numbers correspond to the numbers used on the Clerk's Certificate dated March 8, 1973.

87	5-11-72	Affidavits of Alvin Stein, A. Paul Victor and Herbert Robinson re award of counsel fees in within actions in sum not in excess of 20% of gross settlement.
88	5-11-72	Liebman, Eulau, Robinson & Perlman memorandum of law in support of application to limit and apportion counsel fees.
89	5-12-72	Humble Oil & Refining Co., International Lubricant Corp., Shell Oil Company, Bay Fair Shopping Center, et al., notice of motion and motion for an order setting an evidentiary hearing on 5-24-72 before Metzner, J., on the issues raised by the fee petition of counsel for the temporary class representatives.
105	5-18-72	Class Representative plaintiffs' answer to motion of the commercial and industrial class members represented by Mesirov, Gelman, Jaffe & Levin to postpone the settlement hearing.
106	5-22-72	Defendant American District Telegraph Co.'s affidavit and notice of motion to quash subpoena.

107	5-22-72	Reply affidavit of Herbert Robinson to application of Wald, Harkrader & Ross for apportionment of counsel fees.
184	12-27-72	Affidavit and Notice of Motion by plaintiffs' attorney, David Berger, for an order pursuant to Rule 45(a) calling for production of documents at the settlement hearing scheduled herein for May 24, 1972.
185	12-27-72	Motion of the commercial and industrial class members, etc., to postpone settlement hearing.
186	12-27-72	Memorandum in opposition to motion to compel discovery (pretrial) by attorneys for defendants, Grinnell Corp., American District Telegraph Co., Holmes Electric Protective and Automatic Fire Alarm Co.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITY OF DETROIT, et al.

v.

GRINNELL CORPORATION, et al.,

BAY FAIR SHOPPING CENTER, EXXON CORPORATION, FRIENDSWOOD DEVELOPMENT COMPANY, INTERNATIONAL LUBRICANT CORPORATION and SHELL OIL COMPANY, Claimants,

Appellants.

Docket No.
76-7252

CERTIFICATE OF SERVICE

I, G. Joseph King, an attorney for appellants in the above-entitled appeal, hereby certify that on the 30th day of July, 1976, I served two copies of the Brief For Class Members-Appellants and one copy of the two-volume Appendix, in accordance with Rules 25(a), 30(b) and 31(b), Fed.R.App.P., upon Gordon B. Spivack, Esquire, Lord, Day & Lord, 25 Broadway, New York, New York, 10004, by depositing same in the United States mail, first class postage prepaid.

G. Joseph King